45181

JOHN G. JOHNSON, Appellee,	)	APPEAL FROM
v.	)	MUNICIPAL COURT
J. B. LYNCH, Appellant.	)	OF CHICAGO.

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment in a forcible detainer action ousting him from possession of an apartment which he originally occupied under a written lease.

Prior to the expiration of this lease plaintiff served a written notice that defendant's occupancy after the termination of the lease would be as a tenant from month to month. Service was had by leaving a copy with the eighteen year old son of defendant at the premises. This service meets the requirements of section 10 of the Landlord and Tenant Act (Ill. Rev. Stats. 1949, chap. 80), which, as said by this court in Levin v. Pabst, 241 Ill. App. 74, "points out a method whereby a landlord may serve notice on his tenant concerning the property occupied or rented by the tenant." Other questions raised by defendant do not merit consideration. The month to month tenancy was properly terminated and all requirements of the Federal Rent Control Act complied with.

The judgment is affirmed.

AFFIRMED.

Feinberg, J., concurs.
Tuohy, J., took no part.

342 Ill. App. V

Abstract

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

OCTOBER TERM, A.D.1950

General No. 9703 Agenda No. 5

3 - 1A 9 2

Charles Hubert, Plaintiff-Appellee, vs. C. D. Bertolino, Defendant-Appellant.	Appeal from Circuit Court of Macoupin County

Wheat, P. J.

This is an appeal from a judgment of $3,000.00 entered upon jury verdict for personal injuries and property damages, as a result of the collision of two automobiles at an intersection in Gillespie, Illinois. Motions for judgment notwithstanding the verdict and for new trial were denied.

Plaintiff charged that on October 25, 1948, he was driving his Hudson automobile, with due care and caution, in a westerly direction on Elm Street; that defendant was driving his Dodge truck easterly on said street and negligently attempted to make a left turn northerly on Adams Street, resulting in a collision, by reason of which he was injured and his car was damaged. Defendant filed a general denial answer, with a counterclaim alleging damages by reason of the negligence of plaintiff. The jury found plaintiff not liable as to the counterclaim and awarded him damages as aforesaid.

As to the assignments of error which in substance charged that plaintiff was not in the excercise of due care and that defendant was not negligent,it is sufficient to state that from the evidence,those were questions for the jury.It cannot be said that as to either finding,such was against the manifest weight of the evidenee.

It is then charged that the Court erred in the giving of certain plaintiff's instructions. Considering the instructions as a whole and as a connected body and series,and considering the evidence, it cannot be said that there was any reversible error or that both parties did not have a fair and impartial trial.

The judgment of the Circuit Court is affirmed.

Affirmed.

45151

EDWIN J. BLAKLEY, SR., GLADYS BLAKLEY and EDWIN J. BLAKLEY, JR., a minor, by EDWIN J. BLAKLEY, SR., his father and next friend, Appellants,	)	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
v.	)	
ALBERT GLASS, LeROY HOPKINS and JANE HOPKINS, Appellees.	)	

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiffs from a judgment rendered upon a directed verdict finding the defendants not guilty in a suit for property damages and personal injuries arising out of a collision between an automobile and a horse which escaped from the enclosed pasture of the defendant Glass. On the trial, plaintiffs called defendants for examination under Section Sixty of the Practice Act. The evidence thus produced shows that the horse was purchased by LeRoy Hopkins and given to his daughter Jane who was twelve or thirteen years old at the time of the accident. The defendant Glass's daughter, Barbara, was a friend of Jane's, and on the day in question Jane rode the horse to the Glass place, put him in an enclosed pasture with Barbara's horse, unsaddled and unbridled him, and then attached the gates securely. Later, when the girls were looking out of a window of the house, they saw the horses beyond what they thought might be the fence of the pasture, went out to investigate, found the horses were not in the

pasture, and proceeded to look for them. Edwin Blakley was driving his automobile on Dundee road when the two horses came out of a driveway. Blakley applied his brakes, but struck the Hopkins horse. Jane and Barbara came running out of the driveway through which the horses had passed and asked Blakley if he had seen them. Blakley told them he had hit one of them and that they had run back up the next driveway on the west. The girls immediately ran after the horses, and they were finally returned to their pasture.

The amended complaint on which action was brought charges general and specific negligence. At the trial, however, and in their brief the plaintiffs rely on the statute first passed in 1871 and subsequently amended, (ch. 8, sec. 1, Ill. Rev. Stat. 1949), making it unlawful for an animal to run at large, but providing that no owner or keeper shall be liable for damages on that account if the animal is running at large without his knowledge, when such owner or keeper can establish that he used reasonable care in restraining the animals from so doing. While plaintiffs thus accept the statute as the basis of liability, they do not refer to the statute in their complaint, but base their claim upon general and special negligence, in that the defendants failed to properly guard the horses and permitted them to run unattached on the highway. They also seemed at times during the course of the trial to take the position that having proven the horses were on the highway without

riders, the rule of res ipsa loquitor applied and the burden shifted to the defendants to show that they were not negligent. In oral argument in this court the plaintiffs' counsel reverted to this position. There is some merit to the point that not having pleaded the statute, they cannot rely on it. However, it is our opinion that without respect to these formal objections, the evidence adduced on behalf of the plaintiffs reveals affirmatively that the defendants were not negligent and that there is no liability under the statute.

Neither the defendant Glass nor the defendant Hopkins knew that the horse had been placed in the pasture or consented to its being placed there. There is nothing to show that Glass in any way controlled the keeping of the horse. No act of negligence on his part is shown. Blakley testified that Jane Hopkins told him that "the horse had been kept in the Glass pasture during the day and had gotten out through the broken fence." She was not asked about this and did not testify with respect to it when she was put on the witness stand by the plaintiffs. The conversation was not material so far as the defendants Glass or LeRoy Hopkins were concerned. Blakley, Sr., also testified to a conversation with Barbara Glass to the effect that the horse was kept on the Glass property most of the time. An objection to this testimony insofar as it related to the defendant Glass was also properly sustained. It is not argued that these rulings were erroneous. The only other item of

evidence on which the defendant Glass could be charged with negligence is that Blakley testified that he saw a fence wire down, but did not know whether this was in the Glass pasture or some other field. Further, it is our opinion that Glass was not the keeper of the horse, as that term is used in the statute in question. Something more than the fact that the defendant Jane Hopkins visited her friend Barbara Glass and placed her horse in the Glass pasture is required to fix the responsibility of a keeper on Glass. Hancock v. Finch, 126 Conn. 121 (1939) 9 A 2d 811; Janus v. Akstin, 91 N.H. 373 (1941), 20 A. 2d 552; Raymond v. Bujold, 89 N.H. 380 (1938), 199 A. 91. It also appears affirmatively from the evidence that Glass had provided both a stable and an enclosed pasture for his daughter's horse. In the absence of any evidence to the contrary, that is sufficient to comply with the proviso in the statute.

The testimony presented by the plaintiffs shows affirmatively that Hopkins gave the horse to his daughter and that he did not participate in any way in the arrangement for the visit or visits his daughter made to Barbara Glass. Under these circumstances, no liability can be imposed upon him.

As to Jane Hopkins, her testimony when produced as a witness by the plaintiffs under sec. 60 reveals that she exercised care. She states explicitly that when she arrived at the pasture, she unbridled and unsaddled the horse, let him out in the pasture, and then attached the

gates securely. She continued to observe the horses from the house and when she noticed that they were too far back to be in the pasture, immediately went after them. The only basis upon which the plaintiffs can rest a claim against her is that she said she did not observe the condition of the fences or the gate. It would not be reasonable to expect her to make an inspection of the fences which surrounded the pasture, and as the gate, according to her testimony, was securely fastened, there could be only one conclusion, that it was a secure gate.

Prior to the enactment of the statute in question, there was no liability in Illinois for injuries caused by an animal running at large. The burden was placed on the landlord to fence his land against the depredation of animals. Seeley v. Peters, 10 Ill. 130; C. B. & Q. Ry. Co. v. Cauffman, 38 Ill. 425; Headen v. Rust, 39 Ill. 186. The statute was passed for the purpose of changing the law of Illinois as it was laid down in the cases cited above and was aimed primarily at situations where animals were turned out to graze and roam at large. The fact that a horse is riderless and unattended does not in and of itself constitute running at large within the meaning of the statute. An animal is not running at large where, without negligence on the part of the owner, it escapes from a pasture and the owner goes in pursuit thereof. Collinsville v. Scanland, 58 Ill. 221; Kinder v. Gillespie, 63 Ill. 88; Myers v. Lape, 101 Ill. App. 182; DeBuck v. Gadde, 319 Ill.

App. 609; Guay v. Neele, 340 Ill. App. 111. It is argued by the plaintiffs that having proven the horses were on the highway riderless and apparently unattended, a *prima facie* case was made. Where, however, as in this case, the plaintiffs further prove facts which show no liability either under the statute or the charges of negligence, it was proper for the court to direct a verdict.

Judgment affirmed.

Friend and Scanlan, JJ., concur.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

October Term, A.D. 1950

General No. 9708 Agenda No. 7

342 I.A. 157

EVERETT DALE PHILLIPS, Plaintiff-Appellee, vs. DECATUR CHECKER CAB COMPANY, INC., a Corporation, and HARRY PRICE, Defendants-Appellants.	Appeal from Circuit Court of Macon County

O'Connor, P.J.

The Decatur Checker Cab Co., Inc. and Harry Price, the driver of its cab, both defendants-appellants, have appealed from a judgment of the Circuit Court of Macon County in favor of Everett Dale Phillips in the amount of $15,000.00 as a result of injuries the plaintiff-appellee sustained when, as a pedestrian, he was struck by their cab. The accident occurred about eight P.M. on the evening of October 16, 1948. The weather was rainy and misty at the time of the accident.

The plaintiff went to a tavern across the street from his rooming house of North Jasper Street in Decatur for the purpose of phoning for a taxi. He was there just long enough to make the call. He made no purchases and was sober. North Jasper Street is a paved street 30 feet wide. There is a 15 foot sidewalk extending from the front of the tavern to the westerly curb on North Jasper Street. The plaintiff's rooming house is easterly across the street and northerly about 50 to 60 feet from the tavern. The

tavern in question is about 60 feet north of where East Sangamon Street, running easterly and westerly, crosses North Jasper Street. Immediately south of the intersection Jasper Street declines to the south so as to run under a railroad right of way about 200 feet south from East Sangamon Street.

The plaintiff's intentions, upon leaving the tavern, were to cross the street to his rooming house to get his coat and then to meet the taxi he had ordered. While inside the tavern he could see a Yellow Cab (not involved in this accident and not the cab ordered) parked, headed north, across the street and slightly to the south. As he left the tavern he could see the lights of a car traveling north on Jasper Street south of the Sangamon Street intersection. He saw no traffic approaching from the north, and upon looking again to his right, or south, he saw the car which he had previously seen turn east at Sangamon Street. At one time in his testimony he referred to this look to the south as a "fleeting glance". As it was then raining the plaintiff pulled up his sweater over the back of his head in such a way, according to his testimony, as "not to obstruct his vision". The plaintiff broke into a "trot", which he described as a fast walk, toward his room across the street. The plaintiff was hit by the car coming from the south after he took 2 or 3 steps from the curb. The testimony of other witnesses placed the spot of impact nearer to, but westerly of, the center of the street. Witnesses for both sides failed to see the plaintiff look before going into the street, but they do not claim that he did not look to the south.

The defendant, the driver of the cab, was traveling north. He was alone in the taxi and on his way to pick up a passenger. His windshield wipers were operating, and he had restricted vision to either side.

The speed of his cab was about 30 miles per hour, according to his testimony. He did not see the plaintiff before he struck him, but states that he had "only a vision" of him as he was being hit. The driver does not know in which direction the plaintiff was crossing the street. The taxi traveled about 75 feet after the impact, with the plaintiff caught on the front of the car. The plaintiff received very serious injuries, a compound comminuted fracture of both legs. The injuries caused are, to an extent, permanent, and resulted in medical expense of $2,400.00 to the date of the trial, and considerable loss of time. The verdict was commensurate with the injuries sustained.

The appellants urge that the trial court erred in not directing a verdict for the defendants and in not entering judgment notwithstanding the verdict. In their brief and argument they say that this question revolves more or less about the plaintiff's own contributory negligence. There seems to be little room to dispute that some negligence of the defendants was established in the plaintiff's proof.

If the evidence is such that the minds of reasonable men would differ as to whether or not the plaintiff was in the exercise of due care for his own safety, then that issue must be submitted to the jury. Miller v. Vancil, 339 Ill. App. 1; Gannon v. Kiel, 252 Ill. App. 550, at page 558; Deheave v. Hines, 217 Ill. App. 427, at page 434; and Moran v. Getz, 390 Ill. 478, at page 486.

It is not the province of the trial judge to weigh the evidence to his own personal satisfaction, but rather to determine if there is any evidence which, if true, would have tended to support the verdict for the plaintiff. Blumb v. Getz, 366 Ill. 273.

The plaintiff, with the weather conditions as they were, testified that he looked to the south as he came out of the tavern and he saw the lights of a car coming north. He then looked north and saw no traffic, and then looked south again before he stepped from the sidewalk to see this car turning off on Sangamon Street. He went a short distance into the street and was struck by the taxi and injured. It is true that on cross examination the plaintiff referred to his last southerly observation as a "fleeting glance to the south", but on direct evidence he told of looking to the south on these two occasions and described to the jury the approximate location of the north bound automobile which he saw turn at the intersection. He said there was no traffic between him and the automobile making the turn on Sangamon Street. The plaintiff gave a description of what he saw on that rainy, misty night as he looked to the south twice and the north once before entering the street. There was no evidence in contradiction. On the facts as he described them, we can see reasonable minds differing as to the wisdom of his conduct for his own protection. This is all that is required to make it a jury question, and it was proper for the trial judge to submit the issues to the jury.

It is the next contention of the defendants that it was error not to grant their motion to withdraw Paragraphs 6(d) and 7(d) of the complaint from the consideration of the jury. Paragraph 6(d) alleges a duty and Paragraph 7(d) a breach of that duty to reduce the speed of the taxi as it approached and crossed the intersection of Jasper and Sangamon Streets. These allegations have reference to sub-section C of Paragraph 146 of the Uniform Motor Vehicle Act, which provides in reference to speed:

"The fact that the speed of a vehicle is lower than the foregoing prima facie limits shall not relieve the driver from the duty to decrease ~~the~~ speed when approaching and crossing an intersection * * * ."

In the answer the defendants admitted the duty and denied the breach. This accident occurred approximately 60 feet north of the intersection and therefore it is the theory of the appellants that this statute is not applicable. It can hardly be said that the legislative intent of this statute is solely to reduce the force with which two vehicles might collide, but as well its purpose is to permit more time and opportunity for a driver to observe the traffic, both vehicular and foot, approaching from either side and still not sacrifice his ability to keep track of the traffic ahead of him and approaching from the opposite direction. An intersection places more responsibility on a driver for he has more hazards to observe, and it is highly possible that a failure to slow for an intersection might cause confusion or decrease the efficiency of his observation of the road ahead that might conceivably result in damage 50 or 60 feet, or even more, past the intersection.

Plaintiff's Instruction No. 1 is lengthy and defines the issues contained in the pleadings, both from the complaint and from the answer. The appellants do not contend that the issues are incorrectly stated, but believe that in permitting an instruction of this type to be given amounts to sending the pleadings to the jury room. Appellants also suggest that it could be misleading to the jury to hear the judge mention these issues for they might believe them to be his conclusions.

Defendant's Instruction No. 28 corrected this possibility, as the court could best do by telling the jury that by none of these instructions did he mean to give his personal opinion on questions of fact. It is necessary that the jury know the issues in the case and we know of no other way to inform them other than to accurately state them in the instructions.

Certain instructions in the language of the Motor Vehicle Statute were given the jury. While such practice in general is not approved, yet in the instant case in view of the evidence, and because it is believed no different conclusion would have been reached by the jury had such instruction not been given, any possible error was harmless.

After full consideration of the instructions as a whole they are not such that have deprived the defendant of a fair trial. The judgment of the Circuit Court of Macon County is affirmed.

Judgment affirmed.

Abstract

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

OCTOBER TERM, A.D.1950

General No. 9715 Agenda No. 14

Herman Benning, Plaintiff-Appellee, vs. Frank Niehaus, Defendant-Appellant.	Appeal from Circuit Court of Montgomery County.

Wheat, J.

This is an appeal by the defendant, Frank Niehaus, from a judgment in the sum of $1215.75 in favor of plaintiff, Herman Benning, entered upon a written instrument concerning reimbursement to plaintiff for his services and advances in caring for one Lizzie Niehaus, now deceased.

The matter was heard before the Court without a jury on the pleadings and stipulated facts, and from the latter it appears that defendant's brother, Henry Niehaus, died testate March 31, 1939, leaving a life estate to his wife, Lizzie Niehaus, and upon her death, one-fourth of the remainder to his brother, Frank Niehaus, defendant herein, and one-fourth to his sister, Lizzie Nieke, who thereafter died intestate leaving as her sole heir the defendant, Frank Niehaus, by reason of which he became entitled to one-half of decedent's estate. The other half of the remainder of the Henry Niehaus estate was left to the following relatives of his wife, Lizzie Niehaus, in the proportions indicated: Minnie Miller, sister,

1/12; Hannah Meyers, sister, 1/12; Herman Benning (the plaintiff herein) brother, 1/12; John Benning, brother, 1/12; Helen Benning, niece, 1/12; Frank Benning, nephew, 1/24; and Louis Benning, nephew, 1/24.

The material parts of the instrument upon which this action is based are as follows:

"AGREEMENT

"It is agreed by and between (the above named brothers, sisters, niece and nephews of Lizzie Niehaus and defendant) that (plaintiff) is entitled to receive the sum of $100.00 per month for his services in caring for Lizzie Niehaus, now deceased, together with the sum of $287.71, which (plaintiff) has paid out of his own funds for said Lizzie Niehaus in her lifetime; and that his services in caring for said Lizzie Niehaus began March 1, 1942, and ended December 1, 1946, . . . all of which amount to the sum of $4787.71, and it is further agreed that said sum shall be paid as follows: Whatever remains of the estate of Lizzie Niehaus after payment of other debts . . . shall be paid to (plaintiff) to apply on said indebtedness; the amounts due each of us on account of the sale of (certain real estate previously sold to pay debts and claims against the estate of Henry J. Niehaus) which is about $600.00, shall next be applied on said indebtedness, and the balance shall be paid out of the money due us from the estate of Henry J. Niehaus, deceased. It is understood that the part each of the undersigned are to pay are as follows: Minnie Miller, 1/12; Hannah Meyers, 1/12; Herman Benning, 1/12; Maynard Benning, as executor of the will of John Benning, deceased, 1/12; Helen Benning, 1/12; and Frank Benning, 1/24; and Lewis Benning, 1/24; And Frank Niehaus, 1/2, the same being in the proportions which the parties hereto are entitled on distribution of the estate of said Henry Niehaus, deceased.

"Each of the parties hereto sign and execute this contract in consideration of the signing and execution of the same by all the other parties hereto.

"Litchfield, Illinois, September 13, 1947.

(Signed) Lewis M. Benning	(SEAL)
(Signed) Minnie C. Miller	(SEAL)
(Signed) Maynard Benning	(SEAL)
(Signed) Hannah Meyers	(SEAL)
(Signed) Henry F. Peters Trustee for Hannah Meyers	(SEAL)
(Signed) Frank Benning	(SEAL)
(Signed) Helen Benning	(SEAL)
(Signed) Herman Benning	(SEAL)
_____	(SEAL)
_____	(SEAL)"

On the same paper immediately following the above signatures there was written in longhand the following:

"I agree that (plaintiff) have $75.00 per month plus $287.71 and agree to pay my proportionate share of same, as per above agreement.

"Litchfield, Ill. October 4, 1947

(Signed) Frank Niehaus"

It was stipulated that such instrument was signed by all parties except Frank Niehaus, on or about September 13, 1947, and by him on or about October 4, 1947; that plaintiff paid out of his own funds for Lizzie Niehaus during her lifetime $287.71; that she died testate December 1, 1946; that defendant received no assets from her estate; that the foregoing instrument provided that defendant, if at all liable, was to pay one half of the amount found due plaintiff, but that any such amount should be computed at the rate of $75.00 per month for care for the period therein named instead of at the rate of $100.00 per month, as agreed by other signatories; that on the basis of $75.00 per month the total would amount to $3,062.71 which included the advances of plaintiff; that from this was to be deducted the remaining balance on the estate of Lizzie Niehaus, amounting to $565.33, and the further sum of $667.07 being the balance due upon the sale of certain real estate mentioned in said agreement, leaving a balance of $2,431.31, one-half of which is $1,215.75, the amount for which judgment was entered, and that if defendant owes any amount at all, such latter amount is correct. It was further stipulated that all of the parties named in the agreement except defendant, have paid their pro-rata share of the amount agreed by them to be paid, based on the rate of $100.00 per month; that the estate of Henry Niehaus has been closed and that defendant received as his distributive share therein, the sum of $1,654.57;

Numerous points have been argued by the parties which include

the question as to whether or not the agreement can be regarded as one under seal; as to whether or not defendant by his subsequent signing of an addenda, became bound by the original agreement except as to amount; as to whether or not the addenda of defendant amounted to a rejection of the original offer and amounted to a counter-proposal which was never accepted; and whether there was any consideration as far as defendant was concerned.

It cannot be contended that defendant in signing his name to the addendum by the terms of which he agreed to pay on a basis of a $75.00 per month charge instead of $100.00 did not reject the original proposal. The law is that such is a rejection of the original offer and constitutes the making of a counter-offer. (Worley v. Holding Corporation, 348 Ill.420; Snow v. Schulman, 352 Ill.63). The addenda rejected the original offer, adopted the general plan as to manner and formula of payment as specified in the original instrument, and counter-proposed a settlement at a lesser rate. Was there ever any acceptance of defendant's counter-proposal? It has been held that except where a particular mode of acceptance is prescribed by the offer, an acceptance need not be express or formal, but may be shown by words, acts, conduct, or acquiesence indicating assent to the proposal or offer.

It is to be noted that the counter-offer contained no method of indicating acceptance thereof nor as to any time limitation within which payment might be made by the other parties, or that notification as to the making of the payments be given defendant. It appears from the stipulation that the other parties did make the payments provided for, and it must be held that such was sufficient to constitute an acceptance of defendant's counter-proposal as contained in the addenda.

One question remains and that is as to whether or not there was any consideration to support defendant's counter-proposal. Consideration may relate to a benefit received by the promisor or a detriment incurred or sustained by the promisee at promisor's request. (Williston on Contracts, Sec.102). In this case the promisees as to the counter-proposal were those who agreed to make payments to plaintiff in the original agreement, and such payments were made by them. They surely suffered a loss by reason of accepting the counter-proposal of defendant. Defendant urges that as neither he nor the parties to the original agreement owed any legal duty to support or care for Lizzie Niehaus, for whose care plaintiff was to be reimbursed, there was no consideration for defendant's promise. Assuming this to be true, such is the very element which proves that the other parties suffered a loss or detriment in making payment to plaintiff which they were not lawfully required to do but did on the strength of defendant's counter-proposal. (Gilman v. Ferguson, 116 Ill.App.347). If, on the other hand, the persons related to the original agreement had already been under legal obligation to make the payments which they made, they would have suffered no detriment, and the payments made would not have constituted consideration for defendant's counter-proposal.

A contract having the characteristics of the one under discussion, has been classified as a donee-beneficiary contract, if the purpose of the promisee in obtaining the promise is to make a gift to the beneficiary or confer upon him a right neither due nor supposed or asserted to be due by the beneficiary. In such a case, the third person beneficiary, may in his own name, enforce performance of the promise. (Carson Pirie Scott & Co. v. Parrett, 346 Ill. 252).

By reason of the foregoing it is the opinion of this Court that defendant rejected the original proposal, that he made a counter-proposal, that the same was acted upon and accepted as appears from the stipulation, by the making of payment by the other interested parties to plaintiff, that the plaintiff had a right of action against defendant. In view of the above it is unnecessary to consider the numerous other propositions of law involved and argued in this case.

The judgment of the Circuit Court is affirmed.

Affirmed.

Abstract

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

OCTOBER TERM, A.D. 1950

General No. 9729 Agenda No. 2

People of the State of Illinois, Plaintiff-Defendant in Error,	)	342 I.A. 58
vs.	)	Error to County Court of Scott County
Clyde Coultas, Defendant-Plaintiff in Error.	)	

Wheat, J.

Clyde Coultas, defendant and plaintiff in error, was convicted by a jury on an information charging him with driving an automobile while under the influence of intoxicating liquor. The jury's verdict provided that defendant should be confined in the County Jail for a period of sixty days and that he should pay a fine of $1000.00 and costs. He prosecutes this Writ of Error.

As error it is urged: (1) That the guilt of defendant was not proved beyond a reasonable doubt; (2) Certain exhibits were improperly admitted in evidence; (3) Such exhibits, including a bottle of whiskey, were taken to the Jury Room; (4) The instructions were not marked either given or refused; (5) The jury was recalled to amend its verdict by making a finding as to the age of defendant; (6) No adequate common law record was kept by the Clerk, but in lieu thereof the Judge's minutes appear and purport to be a part of a record.

It will be necessary to consider only assignment No. 6 relating to the adequacy of the record.

In the case of The People vs. Munday, 293 Ill., 191 at 196, the Court quoted with approval the case of McKinney vs. The People, 2 Gilm.,540, and said, "The Court said that in a criminal case, after the caption stating the time and place of holding the Court, the record should consist of the indictment *** the arraignment of the accused; his plea; the impaneling of the traverse jury; their verdict, and the judgment." (See also The People vs. Jones, 375 Ill.,567). In the instant case the amended information appears in the record. Otherwise it does not appear that any record was kept by the Clerk as to any of the proceedings subsequent to the filing of the information, and in particular the record does not show the arraignment, the plea, the impaneling of the jury, nor any final judgment. ~~thereof~~. Reliance is placed by The People on the minutes of the trial judge kept in his docket, which were well detailed and complete. However, it has been many times held that the minutes of the Judge or his docket are not a part of the record and cannot be considered by the Court on review. (See The People vs. Johnson, 345 Ill.,352 at 358; Freeport Motor Casualty Co., vs. Tharp, 406 Ill., 295 at 300).

There being no sufficient record in this case the Writ of Error will be dismissed.

Writ of Error dismissed.

34 Ill. App. 2d

44938

A

ALFRED LEEB and ROBERT EMANUEL, Appellees,	APPEAL FROM
v.	SUPERIOR COURT
JOHN DU MELLE and KARL HELD; and HANS MOSER, individually and as an Officer of Lake Valley Farm Products, Inc., a corporation; and the LAKE VALLEY FARM PRODUCTS, INC., a corporation, Appellants.	COOK COUNTY

342 I.A. 158

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendants appeal from a decree in a suit for specific performance awarding each of the plaintiffs $1,100 and interest as damages for the breach of their several contracts for the purchase of a milk route and a truck from the defendants Du Melle and Held respectively.

On November 23, 1945, Held bought a milk route and a truck for $2,800, payable $500 in cash and the balance in monthly payments of $100 each under a conditional sales agreement with defendant Lake Valley Farm Products, Inc. (hereafter called the dairy), seller, reciting that "Title shall remain vested in the seller until the entire purchase price is paid," and "Buyer shall not assign this agreement without the written consent of the seller." At the same time and partly in consideration of the loan of above sum, he entered into a contract with the dairy whereby it agreed to sell to him and he agreed to buy from it his requirements of milk, cream and other dairy products sold or otherwise dispensed by him in his business as a milk vendor. He further agreed that he would not sell or otherwise transfer

his business as vendor to any other party without notice to the dairy. This contract ran for one year, but was automatically renewable from year to year unless terminated by either party serving a 30-days' notice in writing of intention to terminate it at the end of any current year. On December 3, 1945, Du Melle bought a milk route and truck for $3,000, payable $400 in cash and the balance $3.50 on every day of every week thereafter, and entered into a conditional sales agreement and contract for his requirements of milk, cream and other dairy products, of like tenor and effect as the foregoing obligations of Held with the dairy.

On October 2, 1946, Du Melle agreed in writing to sell his route and truck to plaintiff Leeb for $3,750. Held made a like agreement with the plaintiff Emanuel in respect to his route and truck. Each received a check for $500 as earnest money. The parties went to the office of the dairy where defendant Moser, representative of the dairy in the transaction, asked plaintiffs to sign new contracts for the purchase of their requirements of milk, cream and other dairy products as vendors on the respective routes being purchased by them, similar to the contracts then in force with Du Melle and Held, as a condition precedent to the consent of the dairy to the proposed transfers, and each of the plaintiffs refused to do so. October 5th Du Melle and Held each notified the dairy of the termination of his requirement contract on its anniversary date in 1946. On October 10th plaintiffs delivered to their attorney a check for $6,500, balance of the purchase price, payable to the order of Du Melle and Held, to be turned over to the payees on the transfer of the routes and trucks to plaintiffs.

The next day Du Melle and Held each returned the check for $500 received by him as earnest money, stating: "After giving the matter full consideration, I realize I do not possess the right, title and authority to sell the said equipment and milk route since I am not the legal owner thereof."

Two weeks later this suit in equity was commenced. Du Melle, Held, Moser and the dairy were made defendants and charged with a conspiracy to cause the breach of the contracts with plaintiffs, and with the actual breach of the contracts. Plaintiffs ask for specific performance and also for damages. Defendants filed a joint and several answer denying the conspiracy and alleging that the proposed sales of the routes and trucks were subject to the prior rights of the dairy under the conditional sales agreements and contingent upon obtaining the consent of the dairy, and that the routes and trucks had been sold to bona fide purchasers before the commencement of the suit. The case was heard by the chancellor, who found the defendants jointly and severally liable to plaintiffs for damages "because of conspiracy between said defendants, which conspiracy had for its purpose, and in fact accomplished, the breach of the contracts." He referred the case to a master in chancery to hear evidence on the measure of damages to be awarded the plaintiffs and report his conclusions thereon. The court sustained the report of the master and entered a decree awarding each plaintiff $1,100 as damages for the breach of his contract. From this decree defendants appeal.

We need consider only defendants' contention that "Equity will not retain a complaint for specific performance merely to assess damages where no equitable grounds for relief are shown." Specific performance will not be decreed when it is beyond the power of defendant to perform his

contract. In Burke v. Mierenfeld, 300 Ill. 188, Dickinson entered into an agreement to convey by warranty deed to Albert Mierenfeld and Charlotte Mierenfeld, as joint tenants, certain residence property for $4300, payable $300 in cash and the balance at the rate of $35 a month until there remained but $2200 to be paid, when the purchasers were to receive a warranty deed subject to a mortgage. Before the Mierenfelds were entitled to a deed Mierenfeld was made a defendant in a suit for specific performance of an alleged contract to convey the premises to Burke for $4500. The court said:

> "The mere statement of the facts in this case and the prayer of appellant's bill show that the court must refuse to decree specific performance and that the chancellor properly dismissed the bill. Albert Mierenfeld could not convey a good title to these premises because he had no such title to convey. When it is out of the power of a party to a contract to perform his agreement, such fact necessarily constitutes a sufficient reason for the court to refuse to decree specific performance, for the reason that the decree would be nugatory because of the impossibilty of its execution. (Saur v. Ferris 145 Ill. 115; 4 Pomeroy's Eq. Jur.--4th ed.--sec. 1405.)"

So in the present case, the facts stated above show clearly and conclusively that on October 2, 1946, when defendants Du Melle and Held agreed to sell the milk routes and trucks to the plaintiffs, the title to the routes and trucks was vested in the dairy under conditional sales agreements, and, as stated in the notices from these defendants to plaintiffs on October 11, 1946, Du Melle and Held did "not possess the right, title or authority to sell said equipment or milk route." They had no title to convey. It also appears from the record that before the hearing of the cause the routes

and trucks had been sold to bona fide purchasers. Specific performance cannot be decreed because of the incapacity of the defendants to perform their contracts. The rule in respect to retaining jurisdiction for the assessment of damages for breach of contract when specific performance is denied for this reason, is stated in Pomeroy's Eq. Jur., 5th ed. Vol. 1, sec. 237f (cited by plaintiffs), as follows:

> "If a specific performance was originally possible, but before the commencement of the suit the vendor makes it impossible by a conveyance to a third person; or if the disabilty existed at the very time of entering into the contract on account of a defect in the vendor's title, or other similar reason,--in either of these cases, if the vendee brings his suit in good faith, without a knowledge of the existing disability, supposing, and having reason to suppose, himself entitled to the equitable remedy of a specific performance, and the impossibility is first disclosed by the defendant's answer or in the course of the hearing, then, although the court cannot grant a specific performance, it will retain the cause, assess the plaintiff's damages, and decree a pecuniary judgment in place of the purely equitable relief originally demanded. This rule is settled by an overwhelming preponderance of American authorities."

This is the settled rule in Illinois. Threlkeld v. Norris, 300 Ill. 223; Saur v. Ferris, 145 Ill. 115. In O'Donnell v. Henley, 327 Ill. 406, specific performance of a contract for the sale of real property was denied because the plaintiff (buyer) failed to prove that he was ready, willing and able to comply with the terms of the contract. However, the defendant was directed to return to plaintiff $5000, earnest money which was to be applied on the purchase price in the event the sale was consummated. The court said (p. 411):

> "Recovery of a mere money demand is a matter of strictly legal and not of equitable jurisdiction. It is established by authority and supported by reason that where a case for relief in equity fails,

> a court of equity is without jurisdiction to award other relief by way of disposing of the entire controversy. (Brauer v. Laughlin, 235 Ill. 265; Toledo, St. Louis and New Orleans Railroad Co. v. St. Louis and Ohio River Railroad Co. 208 id. 623; Dodd v. Home Mutual Ins. Co. 22 Ore. 3, 28 Pac. 881; Pond v. Lockwood, 8 Ala. 669.) It follows that where a decree of specific performance is denied upon a bill filed for that purpose and there remains no ground of equitable jurisdiction alleged in the bill and proved on the hearing, the bill will not be retained to assess damages for a failure to perform the contract or to afford other relief which in the first instance is obtainable only in an action at law. (Farson v. Fogg, 205 Ill. 326; Amick v. Ellis, 53 W. Va. 421, 44 S.E. 257; Lewis v. Yale, 4 Fla. 418.) If this were not the rule, a litigant by a pretended claim for equitable relief might deprive his opponent of advantages incident to an action at law."

The testimony of plaintiffs shows that they were informed by the notices of October 11, 1946 of defendants' lack of right, title or authority to sell the routes and trucks. The evidence on the trial clearly establishes that defendants' position was sound in fact and law. Suit was started about two weeks after the sending of the notices. The court erred in retaining jurisdiction and assessing damages.

Other errors assigned by defendants need not be considered. The decree is reversed and the complaint dismissed for want of equity.

REVERSED AND COMPLAINT
DISMISSED FOR WANT OF
EQUITY.

Tuohy and Feinberg, JJ., concur.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

October Term, A.D. 1950

General No. 9716 Agenda No. 15

JOHN ADKINS, et al, Plaintiffs-Appellees, -vs- ALEX CAMPBELL, Defendant-Appellant.	)	Appeal from Circuit Court of Coles County

DADY, J.

John Adkins, hereafter called plaintiff, in May 1949, filed a chancery proceeding against Alex Campbell, hereafter called defendant, to cancel a receipt for earnest payment, to declare defendant had no interest in certain real estate, for damages for wrongful disposition of personal property, for an accounting for rents, and for general relief. The defendant, in addition to answering the complaint, counter-claimed for specific performance of the receipt, for earnest money payment, and for damages. Defendant appeals from a decree in favor of plaintiff.

On November 15, 1948, plaintiff owned the real estate and a stock of groceries and fixtures on the premises. The building thereon consisted of a store and a three room apartment on the first floor and a two room apartment on the second floor. Plaintiff had operated the grocery store until September 13, 1948, when he closed the store. While operating the store he lived in the lower apartment,

Abstract

[illegible]

[illegible] Term, [illegible] 1940

General No. [illegible]

JOHN [illegible], et al,

Plaintiff-appellee,

-vs-

ALEX [illegible],

Defendant-appellant.

DAVY, J.

John [illegible], [illegible] (plaintiff), on [illegible], filed a chancery proceeding [illegible] against Alex [illegible] (defendant), to cancel a receipt for [illegible] payment, to which defendant has no [illegible] in [illegible], for [illegible] for wrongful disposition of [illegible] property, for an accounting for rents, and for general relief. [illegible], in addition to answering the complaint, [illegible] of the receipt, [illegible] appeals from a decree in favor of [illegible].

On November 17, 1942, plaintiff [illegible] a stock of groceries and fixtures on the premises. The building thereon consisted of a store and three room apartment on the first floor and a two room apartment on the second floor. Plaintiff had operated the grocery store until September 1, 1942, when he closed the store. While operating the store he lived in the lower apartment,

and after closing the store apparently continued to live in such upper apartment until going to Michigan as hereafter stated. Defendant occupied the upper apartment at a $10.00 weekly rental. The parties negotiated for a sale and purchase of the real estate and chattels, and on November 16, 1948, executed the following instrument:

"RECEIPT FOR EARNEST PAYMENT

"Received from ALEX CAMPBELL the sum of $100.00 Dollars as earnest payment on purchase of real estate situated at 1604 DeWitt Avenue, Mattoon, Coles County, Illinois and in addition thereto the fixtures, stock and equipment now situated in the grocery store at said address, said grocery operating under the name of John Adkins Grocery, it being agreed that the purchase price of said real estate and said fixtures, stock and equipment is Sixty-five Hundred Dollars ($6500.) and it being further agreed that there shall be executed within the next three days a binding contract for the sale of said real estate and personal property as provided above, said contract to provide that ALEX CAMPBELL shall pay $100.00 Down and the Balance of $400.00 in 30 days and the sum of Fifty Dollars ($50.) per month, said sum to be applied on the outstanding mortgage on said premises now held by the Central National Bank of Mattoon, Mattoon, Illinois."

At that time defendant paid plaintiff $100.00.

Plaintiff testified that at the time of executing the receipt he was getting ready to move to Michigan, and that about November 18th he went to Michigan where he had employment.

Defendant about November 19th or 20th mailed to plaintiff a proposed contract. This instrument provided, among other things, that plaintiff would convey by warranty deed the premises upon the

and after about [illegible] apartments would [illegible] to live in such xxxxx apartments would [illegible] to [illegible] rates.

Defendant counted on [illegible] apartments in [illegible] rental. The parties negotiated for a date and [illegible] of the [illegible] and objects, and on November 18, [illegible] following instrument:

"[illegible] "A" [illegible]

"Received from [illegible] Dollars [illegible] Dollars [illegible] estate situated [illegible] Cook County, Illinois and [illegible] the future. [illegible] in the present [illegible] property [illegible] property, [illegible] or said real [illegible] future, [illegible] and it being agreed that there shall be deducted within [illegible] days [illegible] contract for [illegible] real [illegible] improvement [illegible] contract to provide that [illegible] pay [illegible] in 30 days [illegible] Dollars ($90.) per month [illegible] mortgage [illegible] Illinois."

At this time [illegible]

Plaintiff testified [illegible] the reason the reason it was getting ready to move [illegible] about November 18th he went to Michigan where [illegible].

Defendant about November [illegible] mailed to plaintiff a proposed contract. This instrument provided, among other things, that plaintiff would convey by warranty deed the premises upon the

performance of the various covenants undertaken by defendant, that defendant would pay $100.00 the receipt whereof was acknowledged, and $400.00 upon the execution of the instrument, and that no other cash payments would be due plaintiff, but that defendant would assume and pay the balance of a mortgage to the bank until the principal balance of $6,000.00 was paid in full, such payments to be in the amount of $50.00 per month, that in the event of three consecutive monthly defaults in payments by defendant the plaintiff could forfeit the contract, that possession should be given when the $400.00 was paid, that abstract be furnished by plaintiff showing merchantable title in plaintiff upon payment of the balance due on the mortgage, that defendant maintain insurance on the premises in an amount not less than $5500.00, and that the taxes for the year 1948 be prorated to December 1, 1948, subsequent taxes to be paid by defendant.

Forwarded with said agreement was a proposed bill of sale by which plaintiff was to convey to defendant the groceries and fixtures, and an affidavit for execution by plaintiff stating that the groceries and fixtures were not subject to any outstanding liens, encumbrance or indebtedness, and that there were no outstanding debts chargeable against the grocery business.

Plaintiff testified he did not execute said instruments because he contended they did not represent the understanding between the parties, that he returned to Mattoon about Thanksgiving Day, 1948, but did not see the defendant, that sometime prior to February 28, 1949, the date not being shown, through his attorney, plaintiff served a notice on defendant that the defendant's

performance of the various covenants [illegible], but defendant would pay [illegible] the reasonable rent of the premises, $400 upon the execution of the instrument, and [illegible] payments would be due thereafter, but that [illegible] and pay the balance on a mortgage [illegible] the principal balance of $8,000 [illegible] amount of $50 per month, [illegible] monthly arrears in [illegible] forfeit the contract, [illegible] when the $400 was paid, [illegible] memorandum [illegible] on the mortgage, [illegible] in an amount not less than [illegible] 1948 be prorated to December 1, 1948, [illegible] defendant.

Forwarded with said agreement was a proposed bill of sale by which plaintiff was to convey to defendant the premises, fixtures, and an affidavit for execution by plaintiff stating that the premises and fixtures were not subject to any outstanding liens, encumbrances or indebtedness, and that there were no outstanding claims or payable against the grocery business.

Plaintiff testified he did not execute the instruments because he considered they did not represent the understanding between the parties, that he returned to Boston about Thanksgiving Day, 1948, but did not see the defendant, that sometime prior to February 28, 1949, the date not being known, through his attorney, plaintiff served a notice on defendant that the defendant's

proposed contract did not incorporate the agreement of the parties, that he, plaintiff, was enclosing a copy of plaintiff's proposed contract with said notice, and that the original of same was executed and on deposit with the bank. Said notice further stated that unless said contract was executed by defendant and his wife by February 28, 1949, all negotiations would be considered terminated and plaintiff would expect to be placed in status quo so far as the real estate, stock and fixtures were concerned.

Plaintiff's proposed contract provided that if defendant first made payments and performed covenants, plaintiff would convey by warranty deed for $6,500.00 with interest at six per cent per annum upon unpaid balances, payments to be $100.00 the receipt of which was acknowledged, $400.00 on execution of the contract, at which time possession was to be given, and the balance to be paid to the bank at the rate of not less than $50.00 per month, and that if the indebtedness owed the bank did not amount to $6,000.00 any balance then remaining should be paid plaintiff. It also provided that in the event of default on the payments the contract could be terminated at option of plaintiff, and all payments forfeited, and stated that the sellers by "bill of sale attached hereto" had sold the stock in trade and fixtures to the buyers, and that the buyers had executed a chattel mortgage thereon. It further set forth that since the stock in trade had been sold by the defendant the funds received therefrom should be applied toward the indebtedness at the bank, and upon execution of the agreement defendant would deliver such sum to the bank. It required the defendant to keep the building in repair and to maintain insurance of not less than $5,500.00 and that taxes for 1948 should be prorated.

proposed contract did not incorporate the agreement of the parties, that he, plaintiff, was enclosing a copy of plaintiff's proposed contract with said notice, and that the original contract was executed and on deposit with the bank. Said notice further stated that under said contract was executed by defendant and his wife by February 27, 1949, all negotiations would be considered terminated and plaintiff would expect to be placed in status quo as far as the real estate, stock and fixtures were concerned.

Plaintiff's proposed contract provided that if defendants first made payments and performed covenants, plaintiff would convey by warranty deed for $5500.00 with interest at six per cent per annum upon unpaid balances, payable by the first of the month in which was acknowledged, $400.00 on execution of the contract, at which time possession was to be given, and the balance to be paid to the bank at the rate of not less than $50.00 per month, and that if the indebtedness owed the bank did not amount to $1,150.00, any balance then remaining should be paid plaintiff. It also provided that in the event of default on the payments the contract could be terminated at option of plaintiff, and all payments forfeited, and stated that the sellers by "bill of sale attached hereto" had sold the stock in trade and fixtures to the buyers, and that the buyers had executed a chattel mortgage thereon. It further set forth that since the stock in trade had been sold by the defendant the funds received therefrom should be applied toward the indebtedness at the bank, and upon execution of the agreement defendant would deliver such sum to the bank. It required the defendant to keep the building in repair and to maintain insurance of not less than $5500.00, and that taxes for 1948 should be prorated.

Attached to plaintiff's proposed contract and notice was a proposed bill of sale from plaintiff, covering the stock and fixtures, and a proposed chattel mortgage upon the fixtures, to be executed by defendant and his wife.

Defendant took possession of the premises and the personal property at or about the time the receipt was executed and the check for $100.00 was given to plaintiff, but it does not appear that plaintiff was present when defendant took possession. This check plaintiff cashed. Defendant has not paid to plaintiff any rent since November 17, 1948. He testified he sold part of the stock of merchandise and "threw out the rest." He also sold a cash register and meat block for $215.00. He has rented the store since August, 1949, for $60.00 per month, and has also rented the downstairs apartment for $25.00 per month.

Through his attorney defendant wrote plaintiff on December 27, 1948, that he was ready to pay the $400.00 and that he was delivering it to the bank, together with a more formal agreement, with directions to pay said sum to plaintiff upon the execution of that agreement. On the same date defendant's attorney sent a $400.00 check to the bank together with the original and one copy of defendant's proposed contract, with directions to deliver the $400.00 check upon plaintiff and his wife executing the contract. Defendant also made $50.00 payments to the bank for the months of December 1948 to April 1949, inclusive, which said payments the bank applied toward the indebtedness hereinafter described. Subsequent payments made monthly by defendant to the bank were returned at the instruction of plaintiff.

Attached to plaintiff's protested [illegible] is a proposed bill of sale from plaintiff, [illegible] and a proposed chattel mortgage upon the [illegible] to be executed by defendant and its [illegible].

Defendant [illegible] execution of the [illegible] property [illegible] for $100.00 [illegible], but it [illegible] plaintiff [illegible] plaintiff [illegible] since October 17, 1948. [illegible] or merchandise [illegible] regular and [illegible] August, 1949. For [illegible] estate approximately [illegible].

Through the [illegible] 27, 1948, that he was ready to pay the $400.00 and [illegible] it to the bank, [illegible] to pay said [illegible] plaintiff upon the execution [illegible].

On the same date defendant's attorney sent a $400.00 check to the bank together with the notices and [illegible] defendant's proposed contract, with directions to deliver the $400.00 check upon plaintiff and his wife executing the contract. Defendant also made [illegible] payments to the bank for the months of June, July 1948 to April 1949, inclusive, which said [illegible] the bank [illegible] indebtedness hereinafter described. Defendant tendered a note monthly by defendant to the [illegible] refused at the instigation of plaintiff.

On November 16, 1948, plaintiff owed the bank slightly less than $4,000.00, secured by a mortgage on the real estate, bearing interest at five per cent and payable $42.44 monthly, and owed the bank $1,057.00 on a chattel mortgage on the grocery store fixtures, payable at the rate of $9.13 monthly, and two notes aggregating $1,441.09 which were unsecured. In December 1948 defendant's father paid the bank the indebtedness which was not covered by the real estate mortgage, and the plaintiff then quit-claimed to his mother Fannie M. Adkins his interest in the real estate as security for such payment by his father.

Plaintiff's evidence tended to show that the value of the stock of merchandise was $460.00, that he had advised defendant of his various indebtednesses at the bank, and that he wanted a chattel mortgage on the fixtures, that if any of the stock of merchandise and fixtures were sold defendant was to pay the proceeds of such sale immediately to the bank, that defendant was to pay six per cent interest, and that if the defendant missed two consecutive payments the contract was to be forfeited. Plaintiff also testified that he did not at any time give defendant keys to or possession of the downstairs, and did not give defendant permission to sell the stock of goods, and that defendant was to have defendant's attorney prepare a final contract for both of the parties. Defendant's proof tended to show that there was no agreement for any interest upon the balance from time to time owing, that there was to be no chattel mortgage, that plaintiff merely wanted $500.00 for his interests, and that there was to be a penalty clause in the event three payments were not made. His testimony also is to the effect that it was agreed that he could take possession immediately upon

On November 18, 1948, plaintiff owed the bank slightly less than $4,000.00, secured by a mortgage on the real estate, bearing interest at five per cent and payable $42.44 monthly, and owed the bank $1,087.00 on a chattel mortgage on the grocery store fixtures, payable at the rate of $20.13 monthly, and two notes aggregating $1,441.00 which were unsecured. In December 1948 defendant's father paid the bank the indebtedness which was not covered by the real estate mortgage, and the plaintiff then quit-claimed to his mother Fannie M. Adkins his interest in the real estate as security for such payment by his father.

Plaintiff's evidence tended to show that the value of the stock of merchandise was $400.00, that he had advised defendant of his various indebtedness at the bank, and that he wanted a chattel mortgage on the fixtures, that if any of the stock of merchandise and fixtures were sold defendant was to pay the proceeds of such sale immediately to the bank, that defendant was to pay six per cent interest, and that if the defendant missed two consecutive payments the contract was to be forfeited. Plaintiff also testified that he did not at any time give defendant keys to or possession of the downstairs, and did not give defendant permission to sell the stock of goods, and that defendant was to have defendant's attorney prepare a final contract for both of the parties. Defendant's proof tended to show that there was no agreement for any interest upon the balance from time to time owing, that there was to be no chattel mortgage, that plaintiff merely wanted $600.00 for his interests, and that there was to be a penalty clause in the event three payments were not made. His testimony also is to the effect that it was agreed that he could take possession immediately upon

the execution of the receipt, that plaintiff gave him a key to the downstairs apartment; that plaintiff a few days after the signing of the purchase money receipt in defendant's presence read defendant's proposed contract and approved it, but that he did not sign it, and that plaintiff had agreed that defendant might sell the groceries. As to when possession could be rightfully taken, it will be noted that defendant's proposed contract provided that "possession should be given when the $400.00 was paid," and not when the first $100.00 was paid.

The chancellor found among other things that the contract which defendant presented to plaintiff did not incorporate all of the terms orally agreed upon; that defendant took possession of the merchandise and fixtures and proceeded to sell the same without permission of plaintiff; and that the parties were unable to agree upon a formal written agreement as provided for in the receipt. The decree dismissed defendant's counter-claim for want of equity; decreed that defendant had no right, title or interest in or claim to the premises in question; cancelled and rescinded the receipt, and directed defendant to deliver his copy thereof to the clerk of the court for cancellation; ordered defendant to deliver up possession of the premises to plaintiff; and awarded plaintiff a money judgment for the amount then found to be due on the accounting in the court.

After the case was argued in this court a stipulation was entered into between the parties and Fannie W. Adkins, the mother of plaintiff, that she be made a party plaintiff in the proceeding, that for the purposes of this appeal she be considered as having participated in the hearing in the lower court, and that the prayer

the execution of the contract, [illegible]

downstairs apartments [illegible]

of the purchase money [illegible]

proposed contract [illegible]

that plaintiff [illegible]

As to what possession [illegible]

that defendant's [illegible]

be given [illegible]

was paid.

[illegible]

defendant [illegible]

terms [illegible]

mortgagee [illegible]

permission of plaintiff [illegible]

upon a [illegible]

The decree [illegible]

decreed that defendant had no [illegible] title or interest in or to

the premises in [illegible] and

directed defendant to [illegible] a copy [illegible]

the court for [illegible]

of the premises to [illegible]

for the amount then found to be due on the [illegible] in the court.

After the case was [illegible] a stipulation was

entered into [illegible]

of plaintiff, that [illegible]

that for the purposes of this appeal [illegible]

participated in the hearing in the lower court, and that the prayer

of the complaint be amended to "conform with the decree." An order was entered by this court pursuant to and in conformity with such stipulation. Fannie M. Adkins has not appealed from the decree, and is now bound by such decree.

The decisive issue in this case is whether or not the instrument designated "Receipt for earnest payment" was a binding contract. A memorandum or writing for the sale and purchase of real estate, if it contains the names of the parties, the terms and conditions of the agreement, an adequate description of the property sold, and the signatures of the parties, is sufficient to satisfy the statute of frauds. (Holsz v. Stephen, 362 Ill. 527, 532.) To entitle a party to specific performance of a contract for the sale of lands, it must be clear and certain in its terms, and must be entirely in writing so that all its provisions can be ascertained from the writing itself, without referring to extrinsic evidence. An agreement in writing which does not purport to give an absolute right without further negotiations cannot be specifically enforced. (Westphal v. Buenger, 324 Ill. 77,79; Daytona Gables Co. v. GlenFlora Co., 345 Ill. 371, 394.) A contract for the conveyance of real estate, to be specifically enforced in a court of equity, must be definite, and not so vague that details, which a court cannot supply, must be supplied or adopted before the contract will be complete. (London v. Doering, 325 Ill. 589, 594.)

A cursory examination of the receipt indicates that when it was executed there were to be terms and provisions in the contemplated contract which the receipt did not contain, and that the parties did not consider it as a writing which expressed the full intentions

of the complaint be amended to "conform with the facts." An order was entered by this court pursuant to and in conformity with such stipulation. Bernice T. Atkins has not appealed from the decree, and is now bound by such decree.

The decisive issue in this case is whether or not the instrument designated "receipt for earnest payment" was a binding contract. A memorandum or writing for the sale and purchase of real estate, if it contains the terms of the contract, the time and conditions of the agreement, an adequate description of the property sold, and the signatures of the parties, is sufficient to satisfy the statute of frauds. (Holes v. Stetson, 289 Ill. 327, 329.) To establish a contract to specific performance of a contract for the sale of lands, it must be clear and certain, in its terms, and must be entirely in writing so that all its provisions can be ascertained from the writing itself, without reference to extrinsic evidence. An agreement in writing which does not amount to give an absolute right without further negotiations cannot be specifically enforced. (Keepfall v. Bronner, 324 Ill. 77,79; Dayton Malleable Iron Co. v. Grandview Co., 348 Ill. 371, 374.) A contract for the conveyance of real estate, to be specifically enforced in a court of equity, must be definite, and not so vague that details, which a court cannot supply, must be supplied or adopted before the contract will be complete. (London v. Doering, 328 Ill. 388, 394.)

A cursory examination of the receipt indicates that when it was executed there were to be terms and provisions in the contemplated contract which the receipt did not contain, and that the parties did not consider it as a writing which expressed the full intentions

of their respective minds. The words "There shall be executed *** a binding contract for the sale of said real estate and personal property" can mean only that the parties did not regard the instrument as being sufficiently obligatory upon them. That defendant refused to pay the $400.00 due thirty days after November 15, 1948, unless plaintiff and his wife first executed defendant's proposed contract, which contained many covenants not mentioned in the "Receipt for earnest payment," together with a bill of sale and an affidavit to comply with the Bulk Sales Act, strikingly illustrates that defendant himself recognized this fact.

The receipt stated that the purchase price of the real and personal property was to be $6,500.00 and that payments were to be "applied on the outstanding mortgage on the premises" held by the bank. Defendant's proposed contract provided that the plaintiff would receive nothing other than the first $500.00. It then provided that defendant would pay the bank the "balance of a mortgage held by the bank until the principal of $6,000.00 was paid." The language in such proposed contract certainly did not clearly state that defendant, in addition to paying the real estate mortgage, was to also pay the other indebtedness owed by the defendant to the bank, secured and unsecured.

It will also be noted that the defendant's proposed contract provided that he could not be defaulted until he made not one but three consecutive defaults in payments. This, of course, meant that a default could not be declared for his failure to make one payment or two payments, but that there must first be three consecutive defaults. The receipt made no mention whatever of defaults.

of their respective names. [illegible] "There was [illegible] a binding contract for [illegible] of said real estate [illegible] property" [illegible] that [illegible] as being sufficiently contractual [illegible] to pay the [illegible] plaintiff [illegible] which [illegible] earnest payment [illegible] comply with the [illegible] himself recovered [illegible].

The results stated that [illegible] personal property [illegible] "applies on the [illegible] the bank. [illegible] would receive nothing [illegible] that defendant could [illegible] by the bank until the [illegible] in such proceed [illegible] defendant, in addition to paying the real [illegible] also pay the other indebtedness owed by the defendant to the bank, secured and unsecured.

It will also be noted that the defendant's purchase contract provided that he could not be defaulted until he was not one but three consecutive defaults happened. This [illegible], means that a default could not be declared for his failure to make one payment or two payments, but that there must first be three consecutive defaults. The receipt made no mention whatever of defaults.

In Dreiske v. Eisendrath Co., 214 Ill. 199, where specific performance, which was requested upon an exchange of letters, was denied, the court said at page 203: "From the terms of the letter we must infer that there were other negotiations to be settled by the parties before there was to be a valid, binding contract between them. This construction is sustained by the appellants' letter of acceptance. They clearly indicate therein the understanding that a subsequent contract was to be drawn. *** We are of the opinion that the letters were not intended by the parties to embrace all the terms of the contract upon which the conveyance was to be made, and that the signing of a subsequent contract was a condition precedent to its completion."

We hold in this case that the receipt was not an enforcible contract, but was merely preliminary to the parties entering into a binding agreement which would be complete and certain.

Defendant further urges that plaintiff is estopped to deny the binding effect of the receipt, and that plaintiff has ratified it because he accepted the $100.00 down payment, and because the Central National Bank of Mattoon accepted $50.00 monthly payments from December 1948 to April 1949, inclusive. The record does not show plaintiff authorized or approved such payments. The record shows without contradiction that the negotiations of the parties did not terminate until February 28, 1949; that during such period of negotiations plaintiff, through his father, offered to return to defendant his money and pay his attorney's fees, which offer defendant rejected; that the bank had been directed to refuse the $50.00 monthly payments in January 1949; and that defendant was

in possession of the property and accountable for the reasonable rental value thereof, and for the reasonable market value of the grocery stock and fixtures. Under these circumstances we cannot hold that the plaintiff accepted such benefits as estopped him from urging that the receipt was not a binding agreement. The doctrine of estoppel in pais is never applied except where it would be contrary to equity to allow the assertion of the right, or proof of the fact, to prevail. (Gillett v. Wiley, 126 Ill. 310, 322.) In addition, the fundamental elements of estoppel are not present in this case. (Ludlow Co-Op. Elevator Co. v. Burkland, 338 Ill.App. 255, 260.)

The trial court found that defendant's proposed contract did not contain the true terms upon which the parties had agreed and in our opinion such finding was warranted by the evidence.

The decree in effect found and adjudged that such receipt was not a binding agreement between the parties, and was not enforcible as such. Such decree is affirmed.

Decree affirmed.

in possession of the property and accounted for reasonable rental value thereof, and for the reasonable market value of the grocery stock and fixtures. Under these circumstances we cannot hold that the district court erred in granting the defendant in error urging that the receipt was a binding agreement. The doctrine of estoppel in pais is more specific and it would be contrary to equity to allow the assertion of the right, on account of the fact, to prevail (Ville v. Ville, 120 Ill. 602, 611). In addition, the transaction evidence of account and present in this case. (Lorenz v. Wm. Lorenz & Co., Inc., 1 Ill. App. 265, 280.)

The trial court found that the agreement proved contract did not contain the time being [illegible] on the parties had agreed and in our opinion such finding was warranted by the evidence.

The decree in article 1000 on adjudgment that which might was not a binding agreement between the parties, and was not enforcible as such. Such decree is affirmed.

Decree affirmed.

45178

PAUL RADAKOVICH, Administrator of the Estate of Mary Radakovich, Deceased, Appellee,	APPEAL FROM
v.	CIRCUIT COURT,
GOLDBLATT BROS. INC., a corporation, Appellant.	COOK COUNTY.

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

From an adverse verdict and judgment for $10,000, in an action for wrongful death caused by alleged negligence, defendant appeals.

The original complaint was for personal injuries sustained by decedent when she was a patron in the store of defendant and undeniably an invitee. Pending the action she died, and an amended complaint was filed, setting up that her death was proximately caused by the alleged negligence. Upon the trial plaintiff elected to proceed upon the count for wrongful death.

It appears without dispute that when she was in defendant's store on the day in question, an employee of defendant, pushing a hand-truck filled with merchandise, was looking in the reverse direction, when, with considerable force, the hand-truck knocked down the deceased, throwing her 5 or 6 feet. She was subsequently examined at her home by her attending physician, who found a ventral hernia of recent origin at the site of an old gall bladder operative scar. There was tenderness, swelling and elevation of

tissues at the site of the hernia. The attending physician performed a surgical operation for the hernia and found bleeding had taken place at the site of the hernia, indicating the hernia was of recent origin. After deceased was discharged from the hospital she returned home, and approximately two weeks later the attending physician observed deceased had developed an inguinal hernia due to coughing. September 21, 1946, approximately two months after the first operation, the attending surgeon operated on her for the inguinal hernia and observed at the time that this hernia was of recent origin, due to the thinness of the sac. Deceased later developed a post-operative inguinal hernia at the site of the scar, which the attending physician said was due to the weakness of the tissues, causing this tearing through. The attending surgeon being absent from the city, another surgeon was employed, who ordered the decedent taken to the hospital, and on February 23, 1948, performed a corrective operation for the inguinal hernia. At this latter operation adhesions were found at the site of the original inguinal hernia operative scar, and in an effort to separate the adhesions from the tissues, decedent's urinary bladder was punctured, which developed peritonitis, from which she died on February 25, 1948.

The principal contention of defendant is, that there is no evidence of causal connection between the negligence charged and the inguinal hernia; that this hernia was caused by the coughing and not shown to be due to defendant's negligence; and that the death resulted from the negligence of the surgeon in puncturing the urinary bladder in the second operation for the inguinal hernia.

We have examined the evidence, and we find the testimony of Drs. Timm and Field, called by plaintiff, which, if believed by the jury, tended to prove that deceased was an obese woman of the age of 56; that in the surgery upon her for the ventral hernia, it was necessary to pull the tissue at the site of the operation, which necessarily loosened the fascia, thinned it in the abdominal region, and made it more vulnerable to other injury; that when she coughed during the convalescent period she developed the inguinal hernia from strain of coughing. Dr. Field, on cross examination was asked:

> "Q. Then, Doctor, it is your opinion, based upon a reasonable degree of medical certainty, that this lady's right inguinal hernia came about as a result of coughing? A. Well, that probably was one of the causes.
>
> "Q. Well, what other causes? A. I just told you.
>
> "Q. One of the other causes is the thinness of the wall, is that correct? A. Yes, that it makes her more vulnerable to injury. She does not have to injure herself so much by coughing. Just a small cough. She does not have to cough excessively as she would if she did not have that trouble to start with."

These two witnesses testified that in their opinion the inguinal hernia could or might be caused by the trauma sustained in the accident, coupled with the coughing referred to. The medical testimony on both sides presented a question of fact for the jury, and unless we can say that the verdict of the jury is against the manifest weight of the evidence, we have no right to disturb the verdict. We are satisfied there is ample evidence in the record to prove the causal connection

between the inguinal hernia and defendant's negligence. There is no dispute as to defendant's negligence.

It is contended that the present statute allowing recovery of $15,000 for wrongful death is not applicable, the accident having occured before the present enactment (Theodosis v. Keeshin Motor Express Co., 341 Ill. App. 8); therefore, the court erred in instructing the jury, that if they found for plaintiff, they could award damages not to exceed $15,000. We regard the error in the instruction as harmless. The verdict was for $10,000 which did not exceed the amount allowed by the applicable statute.

Complaint is made that the court allowed incompetent evidence to be received and refused to allow competent evidence offered. We have examined the record and find no merit in the contention.

Upon this record defendant had a fair trial, and the evidence fully justifies the verdict and judgment. The judgment is affirmed.

AFFIRMED.

Niemeyer, P.J., and Tuohy, J., concur.

45200

4

CITY OF CHICAGO, Appellee, v. ALEX PIELET, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Defendant was charged in the Municipal Court of Chicago with a violation of Chapter 39, §39-7 of the Building Code of Chicago, the pertinent provision of which reads:

> "Every building or structure constructed or maintained in violation of any of the building provisions of this code, or which is in an unsanitary condition, or in an unsafe or dangerous condition, or which in any manner endangers the health or safety of any person or persons, is hereby declared to be a public nuisance."

Upon a trial without a jury, the court found defendant guilty and entered a fine of $200.

The proof showed that on the day in question and previous thereto, defendant held title to the lot involved, in trust, and as trustee was the owner of the junk yard in question, located upon a lot in the City of Chicago approximately 125 feet by 175 feet, enclosed by a fence 6 to 7 feet high. The east portion of the fence, adjacent to the alley, leaned at almost a 40 degree angle toward the alley, so that supports to the fence, placed in the alley, were necessary to keep the fence from collapsing. Trucks could not pass through the alley because of the position of the fence. The piles of junk and scrap metal, towering 40 feet high, settled against the fence in question, causing

the condition described. That this condition was unsafe and dangerous to the health and safety of the public is clear.

Defendant's contention is that the fence enclosing the yard is not a "structure" within the meaning of the ordinance, therefore, there could be no violation, there being no building involved, and that "structure" should be considered synonymous with "building" referred to in the ordinance; and secondly, that defendant, being owner as trustee of record, could not be personally charged with the violation.

As to the first contention, it is sufficient answer that the section which defendant is charged with having violated is a part of the Building Code of the City. Section 61-5.1 of the same Code defines "a fence" in the following language:

> "A fence is hereby defined as a structure forming a barrier at grade between lots, between a lot and a street or any alley, or between portions of a lot or lots, such structures being independent of any other."

A definition given in a statute or ordinance is controlling. McCann v. Retirement Board, 331 Ill. 193, 199.

The second contention has no merit, and the cases cited in support thereof have no application, since they are not cases involving the violation of a penal ordinance. One as an owner and in control of property as trustee cannot hide behind his title as trustee, when guilty of the violation of a penal ordinance, resulting from his control and operation of the property, and thus avoid the penalty for such violation.

A trustee, having legal title to real estate together with the right of possession, is regarded as the owner of the property, having all the rights and subject to all the liabilities of ownership. Wahl v. Schmidt, 307 Ill. 331, 336; McKeown v. Pridmore, 310 Ill. App. 634; Kerner v. George, 321 Ill. App. 150, and Siniarski v. Hudson, 338 Ill. App. 137.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Niemeyer, P. J., and Tuohy, J., concur.

45231

UNITED MANUFACTURING COMPANY, an Illinois corporation, Appellee, v. MITCHELL NOVELTY COMPANY, a Wisconsin corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff obtained judgment by confession in the Municipal Court of Chicago, against defendant, in the sum of $22,017.28, which included interest and attorneys' fees. The judgment was predicated upon four conditional sales contracts, which provided for the sale of a coin-operated device called "Shuffle Alley." It is alleged that the amount due was for such machines sold and delivered to defendant.

Defendant filed its petition to vacate the judgment, alleging inter alia that defendant had originated and conceived the coin-operated device in question and made an agreement with plaintiff to turn over the invention to plaintiff; that plaintiff, in consideration thereof, was to manufacture the device and pay defendant a reasonable royalty upon all sales of such machines; that the usual, customary and reasonable royalty would be 5% of the manufacturer's selling price; that such charge of 5% was the customary charge prevailing in the coin machine industry; that plaintiff had manufactured, marketed and sold in excess of 24,000 of said machines at a manufacturer's selling price

of $225.00 each; that defendant purchased a large number of the machines from plaintiff, paying one-half of the purchase price in cash, and the balance evidenced by the conditional sales agreements upon which the judgment by confession was entered; that from time to time, defendant collaborated with plaintiff in the manufacture of said machine and made many recommendations as to the mechanical improvement of said machine, resulting in a more efficient operation of the same; that said recommendations were approved by plaintiff and incorporated in the perfection of said machine; that thereafter defendant requested of the plaintiff an accounting as to the amount due defendant upon machines manufactured and sold by plaintiff, and that finally, on or about January 12, 1950, plaintiff agreed with defendant to satisfy the balance due on said conditional sales contracts by applying, as a credit, enough of said amount due defendant for royalties, and that plaintiff would cancel and mark paid upon its books the balance due upon said conditional sales contracts; and that there was then pending an action in equity, filed by defendant against plaintiff, in the United States District Court, for an accounting in respect to the claim for royalties due defendant. No counter-affidavit was filed or considered by the court, and upon a hearing of the petition, the same was denied, from which order defendant appeals.

The theory of plaintiff, which the trial court adopted, is that a judgment by confession will not be opened merely for the purpose of allowing defendant to file a counterclaim. We deem it unnecessary to discuss the merits of plaintiff's theory, because of the well-settled doctrine

that accord and satisfaction is a good defense to plaintiff's claim. The petition, if true, sets up the defense of accord and satisfaction, the elements of which are clearly stated in Weger v. Robinson Nash Motor Co., 340 Ill. 81, 89. It was there said:

> "Where one person is obligated to pay money to another, a payment made in any mode or with any medium satisfactory to the payee, if such payment is received as a satisfaction of the demand by the payee, is equivalent to and will be treated as a payment in cash."

The trial court should have opened up the judgment and allowed defendant to plead and defend.

For the reason stated the judgment of the Municipal Court is reversed and the cause remanded with directions to enter an order in harmony with the views herein expressed.

REVERSED AND REMANDED
WITH DIRECTIONS.

Niemeyer, P. J., and Tuohy, J., concur.

45236

THE PEOPLE OF THE STATE OF ILLINOIS, Petitioner-Appellee,	APPEAL FROM
v.	SUPERIOR COURT,
UNION TRUST BANK, formerly known as Cloverdale State Bank, Respondent-Appellant.	COOK COUNTY.

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an order entered November 10, 1949, vacating a judgment order of September 12, 1949, dismissing the cause for want of prosecution. The motion to vacate the judgment was entered October 28, 1949, more than 30 days after the judgment. A petition under section 72 of the Civil Practice Act, in the nature of a writ of error coram nobis, was filed, setting up that the present action, being an information in quo warranto seeking to forfeit the franchise of the Union Trust Bank, was put at issue and regularly assigned for trial to Judge O'Malley, sitting in the Superior Court of Cook County; that upon a hearing of the cause, and at the close of the plaintiff's evidence, defendant on March 3, 1947, made its motion for a finding in its favor, and the cause was several times continued for briefs and argument by Judge O'Malley until June 25, 1948. It appears from the record that on June 25, 1948, Judge O'Malley entered the following formal order:

> "Comes now the Respondent, Union Trust Bank, at the close of Petitioner's evidence and moves the Court for a finding for the Respondent on the ground that Petitioner's evidence is insufficient at law to support a judgment for the Petitioner, and the Court

having considered said Motion and the Briefs of Counsel,

"It Is Ordered That said Motion of Respondent for a finding at the close of Petitioner's evidence is hereby denied."

The cause on motion of defendant was continued for introduction of proof by defendant. While the cause was pending before Judge O'Malley, an order by the Executive Committee of the Superior Court assigned all non-jury cases to Judge Sbarbaro, who on September 12, 1949, upon the cause being regularly called before him, no one appearing, dismissed the cause for want of prosecution and entered judgment accordingly.

The petition discloses that plaintiff did not learn of the order of dismissal until October 12, 1949, although the petition was not filed until October 28.

The controlling question is whether the petition in the nature of a writ of error coram nobis conforms with the legal requirements under the statute.

In People v. Bristow, 391 Ill. 101, the court, quoting from Jacobson v. Ashkinaze, 337 Ill. 141, said (p. 116-117):

> "The purpose of the writ coram nobis at common law, and of the statutory motion substituted for it in this State, is to bring before the court rendering the judgment matters of fact not appearing of record, which, if known at the time the judgment was rendered, would have prevented its rendition. Illustrations of such matters are the disability of the parties to sue or defend, the failure of the clerk to file a plea or answer, and the omission to interpose, through fraud, duress or excusable mistake and without negligence on the part of the defendant, a valid defense existing in the facts in the case. The motion is not available to review questions of fact which arise upon the pleadings or to correct errors of the court upon questions of law. [Citations.] The essentials of the proceeding under the statute are the same as they were at common law." (Italics ours.)

Tested by the rule announced, the petition in the instant case falls far short of the legal requirements to sustain coram nobis. The basis for the petition that the matter was pending before Judge O'Malley when the cause was called for trial by Judge Sbarbaro was a matter that appeared of record when the order of dismissal was entered. The petition did not present a fact "not of record," which, if the court had known at the time, it would not have entered the order or judgment. The court was, therefore, without jurisdiction after term time to enter the order appealed from, since the instant petition did not set up such facts that would entitle plaintiff to the relief under section 72.

The order appealed from is reversed.

REVERSED.

Niemeyer, P. J., and Tuchy, J., concur.

45143

CITY OF CHICAGO, a Municipal Corporation, Appellee, v. LILLIE JONES, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Plaintiff in its complaint filed in the Municipal Court of Chicago charged defendant with a violation of the Municipal Code of Chicago, section 145-2, by conducting a laundry without a license at 62 East 44th Street, Chicago, Illinois.

It appears without contradiction that defendant and two other women operated the laundry business, in which sixteen automatic washing machines and two driers were used. It also appears that the three women rented and occupied apartments in the same building in which the laundry was operated, and that clothes were laundered for persons who lived in the building and elsewhere. The court found the defendant guilty and assessed damages in the sum of five dollars and costs.

Section 145-24 of the Municipal Code contains the following exception:

> "The provisions of this chapter relating to laundries shall not apply to any person engaged in doing custom laundry work at her home for a regular trade, nor to any room, or portion thereof, located in a tenement house or other dwelling, in which domestic laundry work is done by or for the occupants of said building exclusively."

Defendant contends, inasmuch as she and her associates in the business all lived in the building in which they operated their laundry, that defendant comes within the above exclusion.

We do not agree with this contention. Defendant's position, if followed to its logical conclusion, would be that any laundry business, no matter how large, might be conducted in a multiple dwelling building provided the workers in the laundry lived in the building. Such was not the intention of the city council. The licensing provision was enacted to permit the authorities to control an instrumentality which, if not properly conducted, would result in danger to the public through the spread of disease in the contamination of clothing. The licensing of laundries is a legitimate exercise of the health regulating powers of the municipality. This conclusion is reached in Ruban v. City of Chicago, 330 Ill. 97.

The exemption of which defendant seeks to take advantage pertains to laundry work performed exclusively by or for the occupants of a building. Defendant's work is not performed exclusively for the occupants of the building. The exemption under the ordinance merely means that, if a landlord furnishes a laundry room for his tenants to be used by any of them in washing their clothes or in having their clothes washed for them, neither the landlord nor the tenants need obtain a laundry license.

Defendant's business was not "domestic laundry work" within the meaning of the ordinance.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Niemeyer, P. J., and Feinberg, J., concur.

45201

CITY OF CHICAGO, Appellee,	)	APPEAL FROM MUNICIPAL
v.	)	COURT OF CHICAGO.
ROBERT CARSON, Appellant.	)	

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

In this case defendant was charged with violation of a city ordinance and the case was tried together with the misdemeanor charge discussed in No. 45202 in which this court has today rendered an opinion, reversing the judgment and remanding the cause. Judgment in this case is likewise reversed and the cause remanded with directions to vacate the judgment and grant the defendant a new trial.

Judgment reversed and cause remanded.

Friend and Scanlan, JJ., concur.

45202

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	)	ERROR TO MUNICIPAL COURT OF CHICAGO.
v.	)	
ROBERT J. CARSON, Plaintiff in Error.	)	

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

The defendant was on information charged with a misdemeanor and his case set for trial in the Municipal Court of Chicago on February 24, 1950. February 14 the appearance of an attorney was entered and the case was called for trial on February 24. At that time defendant's attorney was not present. Nevertheless, the case proceeded to trial. The court found defendant guilty and sentenced him to serve ninety days in the House of Correction. The order recites that defendant was present in his own proper person as well as represented by counsel. Subsequently, a motion was filed by defendant entitled "Motion by Defendant to Correct Error in Fact." Defendant also filed a petition to vacate judgment. In both these motions it was asserted that defendant was not represented by counsel. The People filed a motion to dismiss the petition for writ of error coram nobis. On March 1, 1950 an order was entered reciting that the motion of defendant for a new trial [sic] be continued to March 3, 1950. A further order was entered continuing the motion for a new trial [sic] to March 6, 1950.

At the hearing on March 1, 1950 there was an extended colloquy between the attorney for the defendant and the attorneys representing the state and city (there also being a companion charge of violation of a city ordinance) and in this colloquy it was accepted as true, and admitted by all parties, that at the time the case was first heard, defendant was not represented by counsel. The point in controversy seems to have been whether or not defendant so stated and asked for a continuance before proceeding with the trial, or whether he proceeded with the trial and at the conclusion, feeling that the evidence had gone against him, for the first time asked for a lawyer. The court exhibited considerable solicitude for the defendant's right to have an attorney present. One Edward Carson (apparently father of defendant) said that he had explained to the court before the trial commenced that he had employed a lawyer and desired him to be present. The court continued the case to March 3, 1950. At that time again there was extended colloquy between the court, the assistant state's attorney and the city prosecutor. The judge stated that he had been reminded " *** that the man did ask for his lawyer to come in at that time." There was then some discussion about having the police officers present, and it was finally concluded that they should be present. The case was continued to March 6, 1950

and at that time the police officers were present and were examined. Up to that time, no formal order of any kind had been entered vacating the judgment, allowing the petition for a writ of error coram nobis, or granting a motion for a new trial. The defendant's attorney then stated: "I am not trying to be obnoxious, but it seems as if a new trial is going on without the defendant being here." The police officers were examined and testified to facts concerning the arrest of the defendant and his alleged flight. At that time the city prosecutor stated: "It is true, Judge, and I want to be fair, the man did state at the time that his counsel should be there, but wasn't able to be there." By that he meant at the original trial. At the conclusion of the testimony the court entered the order of March 6, 1950 denying the motion to vacate the judgment. It would appear from the very confused state of the transcript that the court did in effect reopen the case and hear additional evidence, without any formal order, and without defendant being present and presenting his evidence.

For this reason, the judgment is reversed and the cause remanded with directions to vacate the judgment and grant the defendant a new trial.

Judgment reversed and cause remanded.

Friend and Scanlan, JJ., concur.

44955

SAUL H. ROSENSWEIG, Appellee,	)	
v.	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
CHRIST KARRAS and WILLIAM KARRAS, Appellants.	)	

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Saul H. Rosensweig sued Christ Karras and William Karras to recover attorney's fees alleged to be due him for legal services rendered defendants in representing them in their tax difficulties with the United States Government. The case was tried by the court without a jury, and there was a finding in favor of plaintiff, and judgment was entered in the sum of $10,000 against defendants. They appeal.

Plaintiff claimed that he was retained as a lawyer by defendants to represent them not only in their income tax difficulties with the United States Government but also in connection with an investigation that the Government was making of black market charges against defendants.

The major defense raised in the trial court was hat sometime in January, 1947, while the negotiations with the Government were going on, plaintiff came to their place of business and said that he wanted some money in order to represent them; that Christ asked plaintiff what amount he wanted and he said $1,500, that Christ went to the safe, took out $1,500 in cash, and

gave it to plaintiff, and defendants claimed that that payment overpaid plaintiff for any services he rendered. The direct testimony of defendants tended to support this defense. We have concluded to first pass upon the merits of the alleged payment: Upon cross-examination of defendants they stated that after plaintiff asked for the $1,500 Christ went to get the check book in order to give a check to plaintiff but that the latter stated that he did not want a check, that he had to have cash; they admitted that it was their practice whenever they paid out any money for anything to get a receipt, but that they did not receive a receipt when they paid the money to plaintiff; that they had blank receipts on hand at the time and asked plaintiff for a receipt but that he said he had no blank receipts with him; that Christ stated to plaintiff, "We can furnish you with a blank receipt," but that plaintiff said he wanted to give a receipt "on his own stationery," and that when he returned to his office he would make out a receipt and send it to them; that plaintiff never sent them a receipt and they never inquired of him why he did not send a receipt; that when Christ asked plaintiff for a receipt plaintiff dug down in his pocket to get a receipt and stated that he had no receipt with him, that "I am mailing receipt tomorrow morning from my office." Defendants further testified that they had no written evidence at all of the payment to plaintiff, that they

had "no written evidence at all of the withdrawal of any money from any place at the time or before the time they paid Mr. Rosensweig $1500"; that they put no notation in the cash box to show the withdrawal of $1,500 from it. William Karras testified that they keep a record of everything but did not do so in this case. Plaintiff testified that the testimony of the two defendants that they paid him $1,500 was false in toto and that they never paid him a penny for his services; that when the tax matters were settled Christ Karras was very happy and told him he would mail plaintiff a check for his fee the following week; that he waited about a week for his check and none came, and that he went to see them about it and Christ Karras stated that they had paid him $1,500; that when Christ made that statement he, plaintiff, became very angry and asked Christ if he was crazy; that he said to Christ: "When did you give me $1500?" "You darn fool, what are you trying to do - make a liar out of me?" "You never gave me a dime."

In People v. Perri, 381 Ill. 244, the court stated (p. 249):

"The trial judge saw and heard the witnesses testify. He had the opportunity to observe their conduct and demeanor while testifying and was in a better position to weigh their testimony than is a reviewing court. The law has committed to the jury, or to the trial court where a cause is tried by the court, the

determination of the credibility of the witnesses and of the weight to be accorded to their testimony, and where the evidence is merely conflicting this court will not substitute its judgment as to credibility for that of the jury or the trial court. (People v. Bolger, 359 Ill. 58; People v. Mangano, 356 id. 178; People v. Fortino, id. 415; People v. Arbuthnot, 355 Ill. 577; People v. McPheron, 354 id. 381; People v. Herbert, 340 id. 320; People v. Yates, 339 id. 421; People v. Martin, 304 id. 494.) There is evidence to support the conviction and the credit to be attached to such evidence was for the trial judge."

It is evident that the trial court found that the testimony of defendants as to the alleged payment was false, and there is certainly evidence that supports the court's finding. Moreover, after a careful consideration of the evidence in reference to the alleged payment we find ourselves in full accord with the court's finding. Indeed, defendants' counsel have abandoned, in this court, the defense of payment, and that defense is not raised in any of the three points urged here. If defendants' defense of payment is false - and we hold that it is - that fact serves to cast doubt upon their entire testimony. The defense urged in this court is that plaintiff was guilty of unethical conduct, committed an illegal act, and, therefore, public policy will not allow him to recover anything in this case. Plaintiff would have been justified in raising the point that

the instant defense was not urged in the written motion for a new trial and therefore cannot be raised here. Plaintiff, however, has not raised that point and seems willing to have his conduct passed upon by this court.

Plaintiff contends that defendants, in an effort to avoid payment of any fee to plaintiff, have seen fit to make wild charges against him that are not supported by the evidence; that the printed abstract of record filed by defendants was incomplete and inaccurate in many substantial parts and that it was necessary for plaintiff to file a lengthy additional abstract. We find force in plaintiff's contention and have carefully examined the two abstracts, also the record, in determining the material facts in the case.

Plaintiff has been a practicing lawyer at the Chicago bar since October 1, 1934. About March 2, 1941, he became connected with the United States Internal Revenue Department and remained in that employment until November 15, 1944, when he resigned. Plaintiff's work in the Department was to collect taxes and investigate delinquent taxpayers and black market operators. He became familiar with all the rules, regulations and practices of the Department and was an expert in the work and procedure of the Department, and when he resigned he determined that his legal practice thereafter would relate only to tax matters. At the time of the trial he was representing 150 clients in tax matters pending before the Department. Defendants, brothers,

were born in Greece but they have lived in Chicago for over twenty-five years and at the time in question they owned and operated an "equal partnership business" called Canton Food Shop, located at 31 East Van Buren street, in downtown Chicago, where they sold fruits, vegetables, groceries and liquors. Their business was started in 1929 and it became a large and successful one. The business had an account with the First National Bank of Chicago, and also an account with the Continental Illinois National Bank and Trust Company of Chicago. They had safety deposit boxes, where "they kept bonds." Each of the defendants had a private account with another bank. About three or four months prior to December 15, 1946, the date when Christ Karras first met plaintiff, defendants were under investigation by the Federal Government for delinquent income taxes, fraudulent returns, and black market operations. Christ Karras testified that for a number of weeks before he met plaintiff he was in trouble with the Government and that the Government was making an investigation of him and his brother; that Mr. Gillam and Mr. Bennes, Government representatives, called at their place of business and asked to look at their books and records; that after these agents had been at defendants' place of business six times investigating defendants' books and records they took away, and kept, the books and records; that after the Government agents made the first call he was worried and retained Attorney Vosnos to represent them in the

investigation; that he told Vosnos to find out why the Government was investigating them but that Vosnos never reported to him what the Government was doing; that he discussed with Vosnos the Government investigation but Vosnos never told him what he had found out. William Karras testified that he saw Mr. Gillam in the latter's office in December; that his brother Christ was not along; that Mr. Gillam told him that the Government was investigating defendants for fraud, negligence and black market operations; that Gillam stated that the charge of negligence was for failure to file a proper return on his income tax; that "Gillam did not give me the details of the black market charge"; that they were not satisfied with what Mr. Vosnos was doing in the matter and wanted another attorney, and that was the reason they wanted Rosensweig. Christ Karras had a friend, George Pappas, who learned that defendants were involved in tax difficulties with the Government. Pappas was acquainted with one James Leventes, and Pappas and Leventes went to defendants' place of business, where Pappas introduced Leventes to Christ Karras. Leventes testified that Christ Karras took him into a back room at the store and told him that the Government had a black market charge and an income tax violation against him and asked Leventes if he knew somebody that could help him. Leventes answered that he did, and that he would make an appointment; that the man he recommended (Rosensweig) knew what he was doing and was all right; that he was

honest and sincere and would not charge anything unless he could do them some good; that if he did something with the Government he would take one-third of what he saved; that Christ told him to make an appointment with Rosensweig and on Sunday afternoon, December 15, 1946, he and Christ Karras went to see Rosensweig at the latter's place of business at 79th and Ashland, where Leventes introduced Christ to Rosensweig, as follows: "This is Christ Karras, who is in trouble with the Government. This is the fellow that I spoke to you about a week ago over the phone"; that Christ Karras then said, "I am the one who has trouble with the Government in black market fraud and delinquent taxes for the years '43, '44 and '45. What can you do for me?"; that plaintiff told Christ that he could not do a thing for him until he contacted the Government officials to find out what they had against him; that plaintiff asked Karras who the Government officials were who were handling his case and Karras told him that they were Bennes and Gillam; that plaintiff asked Karras if there was another lawyer in the case, and Karras stated that he had a lawyer by the name of Vosnos; that plaintiff then told Christ that before he could handle the matter Karras must have Vosnos withdraw as his attorney with the Government and send him, plaintiff, a copy of the withdrawal notice, and Karras then said, "All right, I will get that for you." Christ Karras testified that the first time he met plaintiff he

asked him to represent them with the Federal Government; that at that time plaintiff told him that he could not represent them until Vosnos withdrew as their attorney; that at that time he told plaintiff that he would communicate with Vosnos and tell him to send a letter to the Internal Revenue Department and withdraw as his attorney; that he then told Vosnos to send a letter of withdrawal to plaintiff. Plaintiff testified that after he met Karras he went to the United States Court House and contacted Government officials Bennes and Gillam and conferred with them about the Government charges against defendants; that Bennes showed plaintiff the work sheets that concerned the Karras tax matter; that the work sheet is a preliminary investigation and is not kept in the regular files, but it has a summary of figures; that that same afternoon he went to defendants' place of business and met the defendants; that he told them that the Government figures showed that they owed the Government in excess of $64,000, plus penalties; that he would want for his fee one-third of the amount between $64,000 and the amount of the final assessment; that there was a delinquent charge for fraud and that there was a possibility of having the files turned over to the District Attorney for prosecution; that Christ Karras then said, "Well, see what you can do with it"; that plaintiff, said, "First I will have to get a form, a power of attorney, and get a release or withdrawal from Vosnos before I can proceed with the case"; that thereafter he received from Vosnos

a withdrawal as attorney for defendants. It is admitted that both defendants signed the power of attorney. Plaintiff further testified that at the time defendants signed the power of attorney he told them that if he did not get the tax reduced he would not charge them anything for his services; that defendants told him that "if you can get that black market charge dismissed, we will give you an extra bonus aside from your fees"; that he received the power of attorney from defendants and had further conferences with the Government officials in the matter; that at one hearing seven or eight Government officials were there, including Bennes; Gillam; Harry O'Grady, the Chief of the Division, and Mr. Henner, Chief of the Internal Revenue Unit, in charge of the Black Market Squad; that one conference lasted about four hours; that after it ended he went to see defendants again and reiterated that the Government wanted $64,000, plus delinquent taxes for 1943, 1944 and 1945, plus penalties; that the Government officials said it was purely and simply a fraud case. Plaintiff further testified that he obtained two financial statements from defendants, both of which he turned over to the Government; that after the first statements were turned over to the Government it was discovered they were false in some respects. Christ Karras testified that the first financial statement he signed did not contain a true statement of all his assets including bonds; that the second statement was a true statement of all his assets

and was for more than the first. Plaintiff also testified that about January 14, 1947, there was a hearing with the Government officials; that both defendants were there; that the matter was thoroughly discussed with the Government officials for about three hours; that Mr. Bennes showed defendants a work sheet and said: "Mr. Christ Karras and Mr. William Karras, you owe the Government approximately $64,000 in money in back taxes, plus a penalty of 50% but that's not up to me. That's up to Mr. Henner, who is head of the Intelligence Unit"; that at the end of that hearing the matter was continued until about January 21, 1947, the Government officials stating they would have a final assessment then ready; that on the last mentioned date the final hearing was held; that plaintiff, defendants, and James Leventes were there, besides the Government officials; that at that meeting the first final assessment form was presented to defendants in the sum of $44,000, plus, and the Government officials stated to defendants that they had taken into consideration all of the items that were claimed to be unjust and that defendants had to pay then and there or the assessment would be made. Plaintiff further testified that he then conferred with his clients and they told him if he could reduce the $44,000 another $10,000 that they would pay $34,000 that day; that he communicated defendants' statement to the Government officials and they stated that they had no authority to further cut the amount demanded, and that only the

Collector, Nigel Campbell, could do that; that thereupon three Government officials, defendants, and plaintiff went to confer with the Collector, and there the whole case was thoroughly discussed and the Collector said: "We will take $34,000 today if you will pay it and sign it today." Plaintiff further testified that he advised defendants that he might get the amount cut further upon appeal before a committee; that defendants desired to take up plaintiff's advice with Attorney Lissner, who was a good friend of William Karras and lived in the same building with him; that defendants then talked with Lissner on the telephone and then told plaintiff that Lissner advised: "You are lucky you are getting away with it. This boy has done a good job. Sign it and get it over with"; that Bennes then recomputed the assessment and defendants were presented with a last and final assessment, the original of which they signed; that the total amount of the assessment was $34,663.60, and defendants paid that amount the next day. William Karras testified that he was satisfied with the amount that they paid the Government; that the Government gave them a full release of all the charges against them and their place of business; that he was pleased with the settlement, was happy, and told the Government officials so; that he was happy because "he knew that they had these black market charges against him and his firm" dismissed; that he told plaintiff that he would send him a check for his fee the next week. William Karras also

testified that he knew that the Government was contending that they did not make out a true return on the income taxes for 1943, 1944 and 1945, and he also knew that the Government claimed that they were delinquent in the payment of income tax because of their operations in the business. Christ Karras also testified that when the settlement was made he felt happy about the case; that he was happy to have all these charges dropped and the whole matter disposed of; that he knew there was a charge of 50% fraud penalty in connection with the tax. He further testified that at the hearing on January 26, 1947, when the Government officials stated that the total amount for tax arrears for his brother and himself "was something in excess of $34,000," he told the officials that if that was the amount the Government wanted from his brother and himself they would pay it, but that before they paid it they wanted to talk with Attorney Lissner; that he and his brother then went to Lissner's office, had a conference with him about the matter, and then went back, saw Mr. Bennes and Mr. Gillam, and told them they would pay the amount asked. Both defendants testified that the highest amount that was mentioned by the Government officials as to their arrears was $34,000; that the amount of fee that plaintiff would charge then was never mentioned by plaintiff nor defendants in any of the talks between them; that plaintiff never told them that the Government wanted $64,000 for the 1943, 1944 and 1945 income taxes plus penalties of

50%.

Defendants contend that in passing upon the credibility of plaintiff we must treat as evidence "the Official Letter from the Collector of Internal Revenue, set forth in said Petition to Vacate" and that said letter "establishes conclusively that plaintiff and his 'chaser' are deliberate perjurers," and "plaintiff's case, therefore, is shattered, has crumpled [crumbled] and completely fails."

On May 13, 1949, the trial court entered a judgment overruling defendants' motion for a new trial and entered the judgment against defendants from which they appeal. On June 9, 1949, defendants filed a petition to vacate the judgment and to grant them a new trial, and an affidavit of defendants was filed in support of the petition. The affidavit is a very lengthy one but we need recite only excerpts from it. The purpose of the petition and motion, as we understand it, was to show that after judgment had been entered defendants' attorneys wrote a letter to the present Collector of Internal Revenue, John T. Jarecki, in which they set up what purport to be certain statements made by plaintiff when he testified in the instant case. The letter of defendants concludes with the following:

"Will you please examine your files and records and advise us as to whether or not there ever was an assessment or proposed assessment against the Karras Brothers, in the amount of $64,000.00 plus penalties

and interest?

"Further, if not, was there ever any assessment or proposed assessment other than the one of $34,660.60, which the taxpayers paid?"

The affidavit of defendants also sets up a letter that the present Collector wrote to defendants' counsel in answer to their letter, which contains the following:

"According to law and regulations, the deputy collector has no authority whatever to make any assessment of tax. His duty is to thoroughly investigate all the facts, discuss them frankly with the taxpayer, and at the termination of his investigation present the results to the taxpayer for his concurrence. In the event the taxpayer does not agree with the deputy's final figure he has the statutory right to protest the recommendations of the deputy collector. The deputy has only the right to recommend the assessment.

"After a thorough check of all records of this office, it must be stated that at no time was a deficiency assessment of $64,000.00 either proposed or assessed. You may feel confident in relying upon the figures set forth in deputy collectors' report of January 27, 1947, copy of which was given to taxpayers, as being the only official proposed assessment recommended by the deputy collectors or any agent from this office." (Italic ours.)

The part of the letter that we have just quoted is what defendants demand that we treat as evidence in

passing upon the credibility of plaintiff. The trial court, after considering the petition and affidavit, denied the prayer of the petition and the motion and defendants do not contend in this court that the trial court erred in denying the prayer of their petition. The record shows that Nigel Campbell was the Collector during the entire time of the investigations in question and that he took part in the final conference between plaintiff and the Government representatives. The present Collector, Jarecki, had no personal knowledge as to what occurred at the various conferences. The letter of Collector Jarecki is not even verified. Plaintiff had no opportunity to cross-examine Collector Jarecki as to the statements made in the letter. If such a letter had been offered by defendants during the trial of the case it would, of course, not be admitted in evidence. The statements in question amount to no more than an opinion based upon the records. Plaintiff, in his testimony, named the following Government representatives as taking part in one or more of the conferences referred to in his testimony: Bennes; Gillam; Harry O'Grady, the Chief of the Division; Mr. Henner, Chief of the Internal Revenue Unit in charge of the Black Market Squad, and Nigel Campbell, the Collector, and plaintiff calls attention to the fact that defendants did not call any of the said persons to contradict his evidence. We note that plaintiff testified that it was Nigel Campbell, the then Collector, who

made the last reduction of $10,000 upon the assessment. The instant contention is so devoid of merit that we are constrained to believe that the real purpose of defendants in raising it is to call our attention to the statements in Collector Jarecki's letter in the hope that they might influence our decision in this case.

Point I, urged by defendants in support of their appeal, is that "recovery by plaintiff is contrary to public policy." This contention is based upon a theory that even though defendants did not pay plaintiff any money on account of his fee, still, plaintiff cannot recover anything for the services he rendered defendants because, defendants contend, it would be against public policy to permit him to recover anything. Defendants state: "Although there is no direct evidence in the record of an agreement between plaintiff and his 'chaser', Leventes, to split fees, yet taking into consideration all of the circumstances and all of the zealous activities and the sworn testimony of said Leventes, none of which was denied by plaintiff, there can be but one conclusion, namely, that Leventes (a layman) expected a part of the fees paid or to be paid plaintiff * * * for Leventes a total stranger went to the store of the defendants and induced them to dismiss their lawyer and retain Rosensweig," and that plaintiff was guilty of conduct contrary to legal ethics and public policy and therefore he cannot recover legal fees against defendants. There is no merit in this contention. Plaintiff and

Leventes both testified that Leventes never solicited any case for plaintiff and that Leventes never received nor asked for any part of any fee paid plaintiff. Defendants testified that they were dissatisfied with the manner in which Attorney Vosnos was representing them in the investigation; that they wanted another attorney and that that was the reason they hired plaintiff. It appears clearly from the evidence that George Pappas, a friend of Christ Karras, learned that defendants were involved in tax difficulties with the Government and he introduced Christ Karras to Leventes, who introduced Christ Karras to plaintiff. Christ Karras testified that the first time he met plaintiff he asked him to represent them in the Federal Government investigation and shortly after that time he obtained from Vosnos the withdrawal of the latter as their attorney in the investigation. Defendants also state that plaintiff "intimidated his clients"; "told his clients what answers to give to the Government," and that "if Rosensweig did obtain information from the Government records prior to December 20, 1946, before the Powers of Attorney were signed, he committed a Federal crime under Title 26 of the U. S. Code, Section 55 (f) (1)." While defendants have not advanced any arguments in support of these last three charges we may say that there is no merit in any of them. Plaintiff is justified in contending that they are "wild charges unsupported by the evidence."

The second point urged by defendants is: "II.

Plaintiff's testimony cannot be given any credence because it is contrary to the law of the United States and contrary to the Rules and Regulations of the U. S. Treasury Department, of which law, rules and regulations the Courts must take judicial notice." Defendants cite in support of this point "Title 26 U. S. Code, Section 55 (f) (1)." It is sufficient to say that that Section has no application to plaintiff under the facts of the case. The argument of defendants that plaintiff was guilty of an infraction of Section 55 and therefore his entire testimony falls, requires no answer.

The third, and last, point urged by defendants is, "The judgment is erroneous, arbitrary, contrary to the law and the facts, and is not based on any evidence in the record." The sole argument made in support of this contention is that the Government's tax claims were against defendants individually and that the claims were in different amounts; that the final assessment against Christ Karras was $24,254.23, and the final assessment against William Karras was $10,409.37, and therefore the trial court was guilty of arbitrary conduct in entering a judgment against both defendants for the full amount claimed by plaintiff. The instant contention is a plain afterthought. Defendants filed a written motion for a new trial and the instant contention was not raised in that motion, and they are, therefore, precluded from raising the instant point in this court. Many cases might be cited in support of our statement of the law, but it is

sufficient to refer to a late case: People v. Cohen, 352 Ill. 380, where the court states (p. 382):

"* * * If certain points in writing particularly specifying the grounds of a motion for a new trial have been filed, the party filing the same will be deemed to have waived all causes for a new trial not set forth in his written grounds and in the Appellate Court will be confined to the reasons specified. If the motion has been submitted without specifying the grounds therefor in writing, the party may avail himself of any cause for a new trial which may appear in the record, whether it be the admission or rejection of evidence, the giving or refusing of instructions, the lack of sufficient evidence, or any other error occurring on the trial. The above holding by this court is applicable to both civil and criminal cases. (Yarber v. Chicago and Alton Railway Co., 235 Ill. 589; Anderson v. Karstens, 297 id. 76; Bromley v. People, 150 id. 297.) The foregoing rules applied to motions for new trial are also applied by this court to motions in arrest of judgment, and when a motion in arrest of judgment does not specify the grounds therefor, it will be presumed, on appeal, that every proper ground for arrest of the judgment was presented to the court. (People v. Goldberg, 287 Ill. 238.)"

In plaintiff's complaint he alleges "that he is a lawyer duly qualified to practice in the State of Illinois. That on or about to-wit December, 1946, he

was retained by the defendants to-wit, Christ Karras and William Karras doing business as the Canton Fruit Shop, to represent them in a black market, fraud and tax evasion proceedings commenced by the U. S. Internal Revenue Office." The following is defendants' answer to that allegation: "They admit that in December, 1946, they consulted plaintiff at a liquor store located at 79th Street and Ashland Avenue, Chicago, and discussed with him an investigation then being conducted by the U. S. Internal Revenue Office and, at plaintiff's request, executed a written instrument which plaintiff stated was a Power of Attorney, authorizing plaintiff to represent them before the department; a copy of said instrument was not given these defendants." Defendants both testified that the business they conducted under the name and style of the Canton Food Shop was a fifty-fifty partnership business. At no time during the trial did defendants indicate to the court that plaintiff's fee should be prorated according to the amount of the taxes paid by each. There is no merit in the instant contention.

After a careful examination of the evidence in this case we are satisfied that the defense interposed in the instant case is not an honest one.

The judgment of the Circuit court of Cook county should be and it is affirmed.

JUDGMENT AFFIRMED.

Schwartz, P. J., and Friend, J., concur.

45027

J. ERNEST WILKINS, Appellee,	)	
	)	APPEAL FROM SUPERIOR
v.	)	
	)	COURT, COOK COUNTY.
CHARLES CROOK, Appellant.	)	

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On February 25, 1949, this cause appeared for the third time on the regular trial call of Judge Schwaba. Neither defendant nor his counsel appeared. Plaintiff appeared, a jury was impanoled, and the hearing proceeded ex parte. The jury returned a verdict for plaintiff and against defendant in the sum of $2,596 and judgment was entered for that sum. An execution was issued, which was placed in the hands of the sheriff with directions to levy upon and sell certain real estate owned by defendant. The sheriff set the real estate sale for June 14, 1949. On June 10, 1949, the following verified petition was filed by defendant:

"Now comes Charles Crook, the defendant herein by Charles V. Falkenberg, his attorney, and respectfully represents unto the Court, that:

"Heretofore, to wit, on the 25th day of February, 1949, this cause came on to be heard upon the regular trial call of the Honorable Peter M. Schwaba, Judge, and an ex parte hearing was had, before the Court and a jury, at the conclusion of which a verdict was rendered by the jury in favor of the plaintiff, J. Ernest Wilkins,

and against this defendant in the sum of $2,596. Judgment was entered upon said verdict by the said Peter M. Schwaba, Judge, on the same day and thereafter execution issued thereon out of the office of the Clerk of this court.

"That pursuant to said order of execution, and at the direction of the plaintiff, the * * * Sheriff of the County of Cook, on or about the 30th day of May, 1949, has notified this defendant that he will at 10 o'clock A. M. on the 14th day of June, 1949, in the usual manner, and as provided by law, offer for sale certain real estate owned and possessed by this defendant in Chicago and located at the address commonly known as 4638-4640 Indiana Avenue, to satisfy said judgment, and legally described as: [describing it]

"That the defendant was not aware of the fact that said cause was on the trial call of said Peter M. Schwaba, Judge, for hearing on said day, or of the fact that it was or had been reached for trial and had never been notified by anyone to be in Court on that day or any other day to defend said suit; that this defendant was not represented by counsel on the hearing of said cause on the said 25th day of February, 1949, nor was he personally present at said hearing, nor did anyone appear in his behalf either as a witness or otherwise, and as a result all of the testimony which was introduced on behalf of the plaintiff, so defendant is informed and believes, was presumably, by the jury which was impanelled to try the issues in said cause, and by the

presiding Judge, accepted as true.

"Defendant further shows that the verdict and judgment were predicated upon a complaint filed by the plaintiff, who, at the time of the filing thereof, and at the present time, is a practicing attorney in the city of Chicago.

"Defendant further shows that the complaint of the plaintiff herein alleges the hiring by the defendant of the plaintiff as an attorney and counsellor at law to discuss and later to represent the defendant in a certain proceeding in the Superior court of Cook county, which proceeding was one for a divorce, in which Charles Crook, this defendant was the plaintiff, and Irene Crook, then his wife, was the defendant, and which suit was thereafter filed in the Superior court Case No. 40S 2297.

"That the complaint further alleged that the plaintiff had rendered services in behalf of the defendant in said divorce proceeding between January 5, 1940 and August 10, 1942, and had devoted approximately two hundred forty hours in that manner, and sought judgment for the sum of $2,770, less credit for payments made by this defendant on account, in the sum of $229.34, and leaving a balance of $2,596.71, plus interest at five percent for alleged vexatious delay. That said services alleged by said Wilkins to have been rendered, were divided as follows:

"Sixty-nine hours in a hearing before Master

Robert M. Adams, on the question of property rights;

"Fifty-eight hours in the preparation and study of pleadings, motions, notices, orders, etc.;

"Seventy-four hours in conferences with this defendant, witnesses and investigators.

"Forty-six hours in attendance in Court, etc., and that said Wilkins had expended the sum of $56.05 in behalf of this defendant, and for all of which, this defendant had promised and agreed to pay the fair and customary fee.

"The answer of the defendant admitted employing the plaintiff, but denied that the services as rendered had required 240 hours of the time of the plaintiff, but had, on the contrary, been of a nominal nature, and that most of the services which had been rendered in said proceeding and the burden of all services had been rendered by one William Haynes, also an attorney and counsellor at law, and officing in the same suite with the said plaintiff, and with knowledge of Wilkins, and who was hired and retained by this defendant while the cause was in process, because of the belief of this defendant, expressed to said Wilkins, that said Wilkins could not cope with the tactics and the defense of the defendant in said divorce case. The answer further stated that if the number of hours alleged had actually been expended by Wilkins, such number of hours were wholly unnecessary for the prosecution of said Complaint for Divorce.

"The replication of the plaintiff reaffirmed and

reasserted most of the allegations in the complaint of the plaintiff.

"Defendant further shows that, to wit, on or about the 2nd day of October, 1947, he had hired, retained, engaged and employed one Sidney P. Brown, of the firm of Brown, Brown, Cyrus and Greene, attorneys and counsellors at law in the city of Chicago to act for and represent him in the defense of the complaint filed by said Wilkins.

"That said firm * * * entered its appearance as counsel for the defendant and filed a demand for a jury to try the issues in this cause, and paid and tendered to the Clerk of this Court the requisite fees therefor. The said firm also filed the answer of the defendant in said cause.

"That this defendant paid to said Sidney P. Brown all moneys due him for legal services rendered herein. That thereafter, in the spring or early summer of 1948, a disagreement developed between the said Sidney P. Brown and this defendant, whereupon, the said Sidney P. Brown, acting for himself and his firm, returned and surrendered to this defendant all of the files in his or its possession pertaining to the suit of Wilkins vs. Crook and announced that he and it were withdrawing from this case and would no longer represent this defendant and that defendant should engage other counsel to represent him in the Wilkins suit.

"That at no time did the said Sidney P. Brown,

formal notice to the defendant that said Sidney P. Brown or said firm was withdrawing as his counsel in said suit of Wilkins vs. Crook, and an examination of the files in the said cause and of the docket and register in the office of the Clerk do not show any formal withdrawal or any order of court authorizing or approving such withdrawal of counsel. That at all times while the suit of Wilkins vs. Crook has been pending, there was in full force and effect in this court a rule numbered 14 pertaining to the withdrawal of attorneys or solicitors and reading as follows:

"'No attorney or solicitor shall be permitted to withdraw his appearance for any party unless the Court shall be satisfied, by affidavit or otherwise, that such party has had reasonable notice of the application for leave to do so.'

"That thereafter, to wit, on or about the 31st day of March, 1948, this defendant hired, engaged and employed one Joseph Clayton to represent him and to act as his counsel in said suit of Wilkins vs. Crook, and that said Joseph Clayton, then and there and at the present time, a member in good standing of the Bar in Chicago, Illinois, and licensed as an attorney and counsellor at law by the Supreme Court of Illinois, stated to this defendant that he would enter his appearance as counsel for the defendant in said cause of Wilkins vs. Crook, and would represent him on the trial and hearing thereof. That at the time of such employment this defendant delivered to said

Joseph Clayton, all of the papers in the suit of Wilkins vs. Crook, which said Sidney P. Brown had surrendered to this defendant.

"That to wit, on the 9th day of April, 1949, this defendant was served with a copy of a writ of execution in the suit of J. Ernest Wilkins versus this defendant, and he was notified, informed and advised by the Sheriff of Cook county, Illinois, that a judgment had been entered in the suit of Wilkins vs. Crook in favor of the plaintiff and against this defendant in the sum of $2,596, and demanding of the defendant that he pay said sum.

"This defendant further states that he thereupon immediately talked to the said Joseph Clayton at the Criminal Courts Building in Chicago, Illinois, and handed to said Clayton the copy of the said writ of execution which defendant had received from the said Sheriff of Cook county and instructed the said Joseph Clayton to take such action as was necessary or expedient to vacate, set aside, open up and hold for naught, the said judgment.

"That in said conversation the said Joseph Clayton again promised and stated to this defendant that he, the said Joseph Clayton, would immediately appear in court and arrange for the vacation and the opening up of said judgment, and to have it set aside, and would further arrange to have said cause re-set for a new hearing, and for this defendant to appear and defend the said

suit of Wilkins vs. Crook at such new hearing and trial. That on at least 20 occasions, this defendant has talked with said Clayton since the purported withdrawal of Sidney P. Brown, as aforesaid, and on each of said occasions, said Clayton has assured this defendant that he, the said Clayton, was taking care of the interests of this defendant in the case of Wilkins vs. Crook.

"This defendant further represents that he has caused an examination to be made of the files in said suit of Wilkins vs. Crook, and of the records of the Clerk of this Court, including the register and docket, and that on the date that this petition is prepared, to wit, the 7th day of June, 1949, such records do not disclose that said Clayton has entered his appearance in this proceeding, nor that any action has been taken by the said Joseph Clayton or by any other person, to open up, vacate or set aside said judgment, but it remains unattacked and in full force and effect, and unless stayed by an order of this Court, the said property of this defendant will be sold, as aforesaid, on the 14th day of June, 1949. That no record has been found from such examination of any notice, motion or order relating to the purported withdrawal of said Sidney P. Brown or the law firm of Brown, Brown, Cyrus and Greene as counsel for this defendant in this suit.

"This defendant calls to the attention of the Court the fact that if it had been known to the trial court when the cause came on for hearing that the said

Sidney P. Brown, or the firm of Brown, Brown, Cyrus and Greene had purportedly withdrawn as this defendant's counsel in said cause, but that no order of withdrawal or notice thereof, as required by the Rules of this Court appeared in the files in said cause, and that said Joseph Clayton had agreed to, but had failed to file his appearance herein, and that this defendant was relying upon the word of the said Clayton to protect his interests therein, but Clayton had not done so, that the trial judge unquestionably would not have permitted the cause to proceed to a hearing without giving the defendant an opportunity to secure other counsel and interpose his defense of payment.

"This defendant further represents that as stated in his answer in said cause, he has a meritorious defense to the said complaint of said Wilkins; that said meritorious defense is as follows:

"That this defendant hired, retained, engaged and employed said Wilkins as his counsel in the suit of Crook vs. Crook on or about December 31, 1939.

"That the said Wilkins rendered some services for him, but not anything approximating 240 hours; in fact, the amount of time expended by him was less than 100 hours, and that he received payment in full for his said services from this defendant.

"That while the divorce of Charles Crook vs. Irene Crook, being case No. 40S 2297 was pending in said Superior court of Cook county, this defendant, not

satisfied with the ability or of the services of said Wilkins, retained and engaged one William Haynes, an office associate of Wilkins to assist the said Wilkins in said suit of Crook vs. Crook, No. 40S 2297.

"That the greater portion of the work in said Case No. 40S 2297 was done and performed by the said Haynes between the 22nd day of May, 1941, and the 18th day of April, 1942, and that for the legal services of said Haynes, this defendant paid to him the sum of $400, which was the total fee requested of this defendant by said Haynes.

"That for the services rendered by the said Wilkins between the 1st day of December, 1939, and the 7th day of May, 1942, this defendant paid to the said Wilkins the sum of $1,278.38, which this defendant states, more than compensated the said Wilkins for the services he rendered; that such sum was paid by check drawn on the Drovers National Bank of Chicago in amounts, on dates and bearing numbers as follows:

"December 1, 1939,	No.	(Cash)	$200.00
December 27, "		(Cash)	150.00
March 9, 1940	6780		251.00
April 27, 1940	6896		15.54
August 9, 1940	7199		45.00
Oct. 17, 1940	7390		200.00
Dec. 3, 1940	7499		200.00
Feb. 10, 1941	7664		50.00
Nov. 26, 1941	8435		65.84
May 7, 1942	8890		100.00

"That in the said complaint filed by said Wilkins against this defendant, the only credit that was given to this defendant for moneys paid by this defendant to either Wilkins or Haynes was the aforementioned sum of $229.34, whereas,

this defendant had actually paid for services in said Superior court Case No. 40S 2297, the total sum of $1,677.38, as hereinabove enumerated, and this defendant is ready and willing to produce such evidence of payment as this court will direct.

"This defendant further states that he has not been negligent in attempting to secure the opening of the vacation of the judgment entered as aforesaid, but that he has acted diligently in an effort to protect his interests and that he should not be held responsible for the derelictions of either Messrs. Sidney P. Brown or the firm of Brown, Brown, Cyrus and Greene, or of Joseph Clayton.

"This defendant calls to the attention of this Court the provisions of Chapter 110, Section 197 [196] (72) of the Revised Statutes of the State of Illinois, reading as follows:

"'The writ of error coram nobis is hereby abolished, and all errors in fact, committed in the proceedings of any court of record, and which, by the common law, could have been corrected by said writ, may be corrected by the court in which the error was committed, upon motion in writing, made at any time within five years after the rendition of final judgment in the case, upon reasonable notice. When the person entitled to make such motion shall be an infant, non compos mentis or under duress, at the time of passing judgment, the time of such disability shall be excluded from the computation of said five years.'

"This defendant earnestly submits that the aforesaid judgment was entered against him by the neglect, carelessness or mistake of the counsel he had hired, engaged and employed to appear for and to represent him as the defendant in said suit of Wilkins vs. Crook.

"That whether or not the court will open up, set aside and vacate such a judgment so rendered, is a matter of sound legal discretion of this Court.

"That his defense of payment if true, would be and constitute a meritorious defense to the complaint of Wilkins.

"That the failure of the plaintiff Wilkins to credit this defendant with the payments made by this defendant as aforesaid, viz., to William Haynes, the sum of $400, and to J. Ernest Wilkins, the sum of $1278.38, constitutes and is an error in fact to justify this Court opening up, setting aside and vacating the said judgment, under the provisions of Chapter 110, Section 197 [196] (72) of the Statutes of this State and herein quoted.

"He therefore prays that the Court will, pursuant to the provisions of Section 197 [196] (72) of Chapter 110 of the Revised Statutes of Illinois, enter an order opening up, vacating, setting aside, and holding for naught, the said judgment heretofore entered herein, and giving and granting unto the defendant the opportunity and right of interposing his defense at a new hearing to be held as the Court shall direct; or

"That the Court will open up said judgment and

grant this defendant leave to appear and defend against said complaint, but order that said judgment stand as security pending the outcome of the requested hearing; or

"That the Court will enter either one of the aforerequested orders and that in consideration thereof, this defendant offers to deposit with the Clerk of the Court a sum equal to the amount of the judgment entered as aforesaid on February 25, 1949, as security for said judgment, and to do all such other things as may be required by the Court in connection therewith."

Plaintiff filed a motion to dismiss defendant's petition and motion upon the ground, inter alia, that the negligence of defendant's counsel set up in the petition is chargeable to defendant. The trial court entered an order denying the prayer of the petition. Defendant appeals from that order.

Defendant "asks this Court to seriously consider these questions: (1) Can Sydney Brown, who entered the Appearance of his firm as counsel for defendant and then left the defendant 'high and dry' by purportedly withdrawing from the case, but without complying with the Rules of Court (of which Rules defendant was ignorant) be considered as defendant's attorney so that his negligence in failing to appear at the trial may be imputed to defendant? (2) Can Joseph Clayton, in view of his aforesaid wilful and wanton disregard of his duties as a member of the Bar of Illinois, be deemed the defend-

ant's attorney so that his complete disregard of the rights of defendant by failing to appear at the trial or to present petitions to vacate judgment, be considered as defendant's counsel, so that his negligence in failing to appear is imputed to the defendant? The defendant prays and hopes that the Court will answer both questions in the negative."

As to question (1): It is true that Court Rule 14 provides: "No attorney or solicitor shall be permitted to withdraw his appearance for any party unless the Court shall be satisfied, by affidavit or otherwise, that such party has had reasonable notice of the application for leave to do so," and it is also true that the petition alleges that no written notice was received by defendant from Brown or his firm that they would withdraw as his counsel, and that no written notice of withdrawal appears in the court records. It will be assumed from the allegations of the petition that Attorney Brown, acting for himself and his firm, did not formally withdraw his appearance as defendant's counsel as contemplated by the rule, but it is idle for defendant to argue that that fact constituted an error of fact that would warrant the vacating of the judgment. The purpose of the rule was to give a litigant reasonable time to obtain another attorney to protect his interests when his attorney seeks to withdraw his appearance. From the allegations of the petition it appears that there had been a disagreement between Attorney Brown and defendant and that that

attorney informed defendant that he was withdrawing and would no longer represent him and that defendant should engage other counsel to represent him in the cause; that defendant accepted from Brown the files in the case and promptly "hired, engaged and employed Joseph Clayton, an attorney-at-law, to substitute for and represent him in the suit filed by Wilkins"; that defendant turned over to Attorney Clayton all of the papers in the case and that attorney "agreed to enter his appearance for and represent defendant at the trial of the cause." Even after defendant discovered that judgment had been entered against him through the gross carelessness of Clayton he still recognized Clayton as his attorney in the cause. It is clear from the allegations of the petition that the judgment was not entered because of any neglect, carelessness or mistake of Attorney Brown. Rule 14, invoked by defendant, does not apply to the pertinent facts of this case.

As to question (2): The allegations of the petition make out a clear case of gross negligence by Attorney Clayton. The law bearing upon this appeal is settled. In McCord v. Briggs & Turivas, 338 Ill. 158, the court states (p. 167): "The motion or petition under section 89 of the Practice Act is not intended to relieve a party from the consequences of his own mistake or negligence. (Craner v. Commercial Men's Ass'n, 260 Ill. 516.)" It is also settled law that the negligence of the attorney in a law suit is the negligence of the client. (See Staunton Coal Co. v. Monk, 197 Ill. 369, 375.) In Imbric v. Bear, 230

Ill. App. 155, the court states (p. 157): "It is well settled that relief will be barred where the applicant has been guilty of negligence, and that an agent's or attorney's neglect or want of diligence is binding on the principal. (Simon v. Hengels, 107 Ill. App. 174; Foster v. Weber, 110 Ill. App. 5; Eggleston v. Royal Trust Co., 205 Ill. 170; Staunton Coal Co. v. Menk, 197 Ill. 369.)" Defendant alleges in his petition that "judgment was entered against him by the neglect, carelessness or mistake of the counsel he had hired, engaged and employed to appear for and to represent him as the defendant in said suit of Wilkins vs. Crook. That whether or not the Court will open up, set aside and vacate such a judgment so rendered, is a matter of sound legal discretion of this Court." The trial court had no discretion to ignore the settled rules of law in passing upon the instant petition, nor have we.

Defendant contends that his petition "sets up facts, which if true constitutes a meritorious defense," and that such defense "is an error in fact sufficient to justify an order vacating ex parte judgment." There is no merit in this contention. "Lack of knowledge by the court of facts in the case which constitute a defense is not the error of fact which can be corrected by motion" in the nature of a writ of error coram nobis. (Marabia v. Thompson Hospital, 309 Ill. 147, 155.)

The judgment of the Superior court of Cook County is affirmed.

JUDGMENT AFFIRMED.

Schwartz, P. J., and Friend, J., concur.

44524

PEOPLE OF THE STATE OF ILLINOIS, ex rel. JOHN RUSCH, Appellee, v. IRENE BAKER, MARY C. McCORMICK, GEORGE CADOGAN, ALICE BICKMEYER and GERALDINE BERGREN, Appellants.	)	APPEAL FROM COUNTY COURT COOK COUNTY.

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MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Respondents, who were the judges and clerks of election in the 47th Precinct of the 30th Ward in the City of Chicago on an election held June 3, 1946, appeal from the judgment of the County Court of Cook County finding them guilty of contempt and sentencing each of them to the County Jail for a period of one year.

The petition charges respondents with permitting "applications to be presented and filed and ballots to be cast in the names of persons who did not personally appear at the polling place and vote"; with "permitting applications containing forged signatures of voters to be presented and filed and ballots cast in the name of the same"; and with making "a false canvass and return of the votes cast."

Respondents filed a petition praying that the cause be transferred to another judge on the grounds that the trial judge was a candidate for re-election in 1946, and would be "unduly and improperly influenced and prejudiced against respondents" as a result of certain newspaper editorials which are attached to respondents' petition. The record shows that the trial judge was not a candidate at

the election in which the misconduct in the instant case is charged. Since there is no right to a change of venue from a court trying its own officers (People ex rel. Marski v. Belvedere, 333 Ill. App. 104) the petition was properly denied.

June 3, 1946 there was an election of six judges of the Superior Court and a propositional election for voting on certain City and County bonds, and a proposition to increase aldermen's salaries in the City of Chicago. Respondents Alice Bickmeyer and Mary C. McCormick were Republican judges of election, George Cadogan was Democratic judge of election, Irene Baker was Republican clerk of election, and Geraldine Bergren was Democratic clerk of election.

The returns of respondents to the Board of Election Commissioners showed that at the election held June 3, 1946, 301 persons voted. Petitioner presented 49 witnesses. Forty-one witnesses testified that they did not vote and that their names appearing on the applications were not written by them. Of this number four had two applications for each of their names, both of which were forgeries. Eight witnesses testified that they voted once, and that the other applications in their names were not in their handwriting.

Rudolph B. Salmon, whose qualifications as a handwriting expert were admitted by respondents, testified that the forged applications for ballots could be placed in three groups of writing, each group written by the same person, consisting of 172 in the first group, 22 in the second group,

and 23 in the third group. Seventeen forged applications were not placed in any particular group. After examining specimens of admitted handwriting of respondents Bergren and McCormick, the witness stated that in his opinion respondent Bergren wrote 171 of the forgeries, and respondent McCormick wrote 22 forgeries, and that the applications for ballots alleged to have been forged by respondents Bergren and McCormick fall within groups 1 and 2, respectively.

Respondents' main contention is that the judgment is predicated on incompetent and immaterial evidence. George Cadogan testified that he had suffered from an epileptic attack on the morning of the day of the election, and did not reach the polling place until noon; that he stood at the ballot box "handing out ballots and putting them in the box"; that he initialed some of the ballots; that after being at the polls two or three hours he went out to lunch; and that afterwards he assisted in the counting of the ballots. Irene Baker stated that she wrote the Ward and Precinct numbers on applications for ballots many of which she identified on the trial; that she handed applications to the voters, "printed the names in" and gave each application back to the judges for "to check" the signature. Alice Bickmeyer testified that when the polls opened she took charge of the "back part of the binder from M to S * * * all day except while I was taking somebody else's place or helping somebody else out that was at home," and that she was out of the polling place once in the morning and once in the afternoon.

The evidence discloses that the polling place was located in a cigar store where a large number of the patrons of the store entered all day long making purchases. In performing their duties respondents used two tables placed together near the counter of the store. These tables were so small that there was not enough room for all of the respondents to be seated there at one time, and the space between the tables and the counter was barely wide enough to permit patrons of the store to pass through while making their purchases. Nearby public telephone booths were located, which were in constant use during the day of the election. A policeman was present all day during the election. All of the respondents denied having committed any of the acts charged in the petition.

The instant proceeding is one for civil contempt, and the guilt of respondents must be established by a preponderance of the evidence. Proof of a violation of election laws is not alone sufficient to prove guilt. See People v. Fusco, 397 Ill. 468. From a reading of the record we do not think there is any evidence connecting respondents Cadogan, Baker and Bickmeyer with the forged applications for ballots, the casting of ballots, or any of the charges alleged in the petition.

As to respondents Bergren and McCormick, Rudolph Salmon testified that he compared the signature of the purported voter appearing on each application for a ballot with the same voter's signature on the registration or "binder" card and that "in his opinion" the persons who had written

the applications for ballot here in controversy were not the same persons who had written the signatures appearing on the corresponding registration cards; that the signatures upon the applications for ballot which were listed by the witness in group 1 were written by the person who wrote the name Geraldine Bergren on the poll record and other documents in evidence. The witness further testified that the person who wrote the name Mary C. McCormick on the application for a ballot submitted is the same person that wrote the signatures upon the applications for ballots in group 2; that he had no opinion as to who wrote the applications for ballots in group 3; and that the witness had no opinion whether respondents other than Bergren and McCormick wrote any applications for ballot. The witness also stated that a comparison of the specimens of the admitted handwritings of respondents Bergren and McCormick with the applications for ballots in groups 1 and 2 indicates in his "opinion" the same general type of writing peculiarities and characteristics of making letters and their combinations.

In the recent case of In Re Will of Barrie, 393 Ill. 111, at page 123, our Supreme Court, adverting to Fekete v. Fekete, 323 Ill. 468, said: "That opinions as to the genuineness of handwriting are at best weak and unsatisfactory and that there is much room for error and great temptation to form opinions favorable to the party calling the witness, is clearly demonstrated by the record in this case. The opinion of an expert may be of value only where

it calls attention to facts which are capable of verification by the court and where the opinion is based upon such facts and is in harmony therewith," citing Lyon v. Oliver, 316 Ill. 292. Here petitioner's case against respondents Bergren and McCormick rests solely upon the testimony of the handwriting expert. Witness Salmon did not point out specifically in any of the alleged forged applications what the "peculiarities" or "characteristics" consisted of or how they might be recognized. The applications for ballots and the voters' signature cards are in the record before us and we have examined them. Some appear to be in handwriting similar to the specimens of genuine handwriting of respondents Bergren and McCormick, but in his testimony Salmon failed to give any factual details capable of verification by this court.

Petitioner relies strongly upon People ex rel. Marski v. Belvedere, 333 Ill. 104. There two of the respondents who served as judges of election in charge of precinct registration cards were required to compare the signature on each application for a ballot with the signature on the registration card, as a means of identifying the voter. They admitted their failure to make this comparison, and the court held, upon this admission coupled with the evidence relating to the forged applications and the casting of ballots on such applications, that they were guilty of the misconduct charged against them. An examination of the record in that case discloses that the expert gave testimony showing certain letters in names on applications for ballots there in question had characteristics similar to the hand-

writing specimens used as a basis for comparison. In the present case the expert's testimony lacks such a background of detail and is virtually an unsupported general opinion on the ultimate issue in this case. Under these circumstances and in view of the respondents' denial of guilt we do not think that the testimony of the handwriting expert has the probative force necessary to establish petitioner's case against respondents Bergren and McCormick.

At the close of the evidence, the trial judge, addressing respondents' counsel, said: "I have given them (respondents) an opportunity. I do not think they did what they did but they are afraid to talk or else they are shielding, deliberately shielding, somebody. They must take the burden of the penalty. I cannot protect them to that extent. These are serious things." From the foregoing comment by the trial judge we think it can be reasonably inferred that he, as we, found the testimony against respondents inadequate to prove that they committed the acts charged against them. The record discloses that there is evidence of gross violations of the election laws and some evidence tending to prove the charges against the respondents Bergren and McCormick.

For the reasons stated, the judgment as to the respondents Cadogan, Baker and Bickmeyer is reversed; and as to respondents Bergren and McCormick the judgment is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AS TO CERTAIN RESPONDENTS:

JUDGMENT REVERSED AND CAUSE REMANDED FOR NEW TRIAL AS TO CERTAIN RESPONDENTS.

BURKE, J., CONCURRING:

KILEY, J., NOT PARTICIPATING.

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45004

IDELL McSEE, Appellant,	)	
v.	)	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
CHICAGO MOTOR COACH COMPANY, a corporation, GEORGE F. ALGER COMPANY, a corporation; JOSEPH BARKMAN COMPANY, a corporation, and NICK STANOVICH, Appellees.	)	

342 I.A. 238

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the Chicago Motor Coach Company, George F. Alger Company, Joseph Barkman Company, corporations, and Nick Stanovich, individually, to recover damages for injuries sustained by her when a motor coach company bus in which she was riding as a passenger became involved in a collision with a truck operated by the other defendants at the intersection of 65th street and South Parkway in Chicago. The jury returned a verdict finding the defendants George F. Alger Company and Joseph Barkman Company not guilty, but finding the defendant Chicago Motor Coach Company guilty, and assessing the plaintiff's damages against it in the sum of $10,000.00. Judgment was accordingly entered on the verdict, and plaintiff appeals solely on the ground that the damages were inadequate.

The accident occurred on December 30, 1946 at about 5:30 P.M., after darkness had set in. The roadway was icy, and it was about 14 degrees above zero. The motor coach was a conventional one-man operation, with the driver sitting at the left front portion. There

were cross seats on either side of an aisle down the center of the bus, together with a long seat immediately behind the driver, and a similar seat on the other side of the aisle. The coach was proceeding south on South Parkway. Upon reaching 65th street it turned east, and when the front of the bus was about 18 feet west of the east curb line, a southbound truck struck the left rear wheel of the bus with its "right front." Plaintiff, who was sitting on the long seat behind the driver, claims to have been thrown on her knees as the result of the impact, and was assisted to her feet by some of the passengers. She remained on the bus and rode to 66th and Vernon, from where two of the women passengers accompanied plaintiff to her home. There is a conflict in the evidence as to the nature and extent of the accident. Plaintiff testified that "the impact was so terrific that I was thrown off the seat to the floor and I landed on my knees." Other witnesses described the collision as either "a brush" or a slight or mild contact between the two vehicles, both of which were proceeding very slowly on an icy pavement. Neither the bus nor the truck showed any substantial damage, indicating only a slight impact. However, inasmuch as the inadequacy of the damages is the only controverted question on appeal, it will be unnecessary to review or analyze the testimony on the question of liability.

After plaintiff had walked to her home with two of the passengers, Dr. Edward W. Beasley, who had pre-

viously treated plaintiff when she had been injured in a taxicab accident in January of 1942, was called in attendance. He ordered her leg elevated, prescribed wet-heat applications, and took care of her for about ten days. He then referred her to Dr. Homer Cooper, an orthopedic surgeon, who, after examining her on January 20, 1947, prescribed physiotherapy treatments.

Plaintiff returned to her work with the United States Treasury Department in the Merchandise Mart on February 24, 1947, and thereafter, on March 22, she consulted Dr. U. G. Dailey, who, pursuant to examination, referred her to Dr. Horace E. Turner. Dr. Turner, who examined her on March 31, testified that he found an atrophy of the right thigh and a clicking or crepitation in the knee, but he did not treat plaintiff at any time. In July 1947 plaintiff was referred to Dr. Edward L. Compere, who examined her that month and again on October 11, 1947. He testified that when he first examined plaintiff she complained of pain in her knee and difficulty in walking, particularly in going up or downstairs. Examination of the patient at that time revealed no swelling of the knee itself, no abnormal appearance of either leg, but there was a slight swelling over one of the tendons at the back of the knee and some evidence of pain upon pressure applied along the outer or lateral side of the knee joint. His initial diagnosis was bursitis with inflammation of the tendon sheet of the lateral hamstring muscle, and he recommended

application of a plaster cast to hold the knee in a position of complete extension. The cast was applied, and Dr. Compere, on re-examining plaintiff on October 11 at Provident Hospital, found that the tenderness at that time, the evidence of pain on pressure, was in the region of the patella or kneecap, and that attempts to straighten the leg against resistance caused the patella to lock or catch so that it did not slide normally as it should do when the knee is flexed or extended. The second diagnosis was osteochondritis dissicans with chondromalacia of the patella. Chrondromalacia is a condition confined to the type of cartilage that lines joints, that covers the ends of the bones, keeps them smooth, and in this instance, lying underneath the surface of the kneecap--becomes soft and rough so that it doesn't slide smoothly as it normally would, but catches as the knee joint is moved. The witness stated that in his initial examination there was no evidence of softening of the patella cartilage, and no catching. He also testified that the condition of osteochondritis dissicans takes some time to develop, and was in no way connected with the bursitis that appeared on his first examination. He recommended surgery, and on October 23 performed an operation under a general anesthetic. When the joint was opened, the semi-lunar cartilages were examined and found to be entirely normal. The surfaces of weight bearing on the thigh bone, the femur, and on the large lower leg bone, the tibia, were entirely smooth. The notch on the femur,

on which the patella rests, was slightly roughened, and there was a very thin growth of tissue spreading part way across it. When the patella was turned over, the cartilage underneath was found to be quite rough and discolored. The operation consisted of removing the soft area of cartilage and some thin bone substances. Following the operation Dr. Compere made certain recommendations as to treatment to Dr. Dailey, who then had charge of the case.

On the seventh post-operative day plaintiff began to cough, have pain in the chest, spit up bloody sputum, and run a fever. Her condition was diagnosed as a pulmonary infarct, or a blood clot in the lung. Such a condition may very well occur about a week after surgery, but it is likewise possible for the condition to occur independently of surgery. Dr. Lucius Winby, an internist, was called into the case. Drugs were administered to combat infection, and numerous X-rays were taken, both before and after the operation. Some sixteen doctors attended plaintiff from time to time, but only five testified for plaintiff at the trial. There is an irreconciliable conflict in their testimony as to the nature and extent of the injuries, and the possible causal relationship between the injuries and the accident.

Plaintiff complains that the damages awarded to her, in the amount of $10,000.00, are inadequate, since she expended substantially $9000.00 for medical and

hospital expenses, and that the $1000.00 differential cannot fairly be considered to cover her salary loss, and the pain and suffering she experienced, as a proximate result of the accident. The case was fairly tried. No complaint is made by either of the principal parties in this court as to instructions, or the admissibility or rejection of evidence. As the case was presented, it was a question of fact to be determined by the jury under the evidence adduced at the trial whether plaintiff sustained an injury to her knee in the occurrence, the nature and extent thereof, and whether or not her condition of ill-being was a direct proximate result of the injury which she might have sustained on defendant's motor coach.

We have examined the instructions carefully. The jury were fully charged on every phase of the case. Instruction 20 told them that the burden of proof was on plaintiff to establish not only that such ailments and losses "really exist, or have existed," but also that they were the result of the accident in question and not the result of some other injury or disability (she was injured in two other accidents, and was hospitalized on two or three occasions for internal infections of one kind or another). Instruction 2 told the jury that if they found that the defendants, or any one of them, was guilty, and that plaintiff had sustained damages "as a natural, direct and proximate result of being injured in the manner and as charged in the complaint as amended,

then to enable the jury to estimate the amount of such damages, if any caused by pain and suffering, it is not necessary that any witness should have expressed an opinion as to the amount of such damages, but the jurors make such estimate from the facts and circumstances, proved by the evidence, considering those in connection with their knowledge, observation and experience in the ordinary affairs of life." Instruction 5 told the jury that if they found plaintiff was injured as a direct and proximate result of the accident, they should assess the damages in an amount which would be "a fair and reasonable compensation for such injuries and damages, if any, the plaintiff has sustained or will sustain insofar, if at all." In instruction 15 the jury were told that they were "not required to set aside [their] own common observation and experience as men and women in the affairs of life," but, on the contrary, they had a right to consider such observation and experience in determining where the truth lay in any issue in the case.

There is hardly any conceivable phase affecting liability, damages and the credibility of witnesses, that was not covered in the 37 instructions given to the jury. In view of the numerous conflicting questions pertaining to the medical evidence, it was the duty of the jury, under proper instructions, to assess the damages. Where no complaint is made that the jury were not properly instructed, the reviewing court will not disturb the amount of the damages (People v. Palmer,

351 Ill. 319; Ford v. Friel, 330 Ill. App. 136; Hannigan v. Elgin, J. & E. Ry. Co., 337 Ill. App. 538), unless, as in rare cases, the damages are so palpably inadequate as to require reversal. In substantially all the cases cited and relied upon by plaintiff, where judgments were reversed because of the inadequacy of damages, the medical evidence of injury was undisputed, and the amounts awarded by the jury were patently inadequate. In the case at bar the evidence relating to plaintiff's injury and its causes was in many of its aspects irreconciliable, especially in view of evidence relating to prior injuries. It was for the jury to determine the facts and fix the amount.

We find no convincing reason for disturbing the verdict and judgment relating to the other defendants. Therefore, the judgment of the Superior Court is affirmed *in toto*.

Judgment affirmed.

Schwartz, P. J., and Scanlan, J., concur.

45065

LOU EMMA MOORE, Appellee, v. FRANK LOWERY, Individually and d/b/a THE CAFE DE SOCIETY, MORRIS INVESTMENT COMPANY, an Illinois corporation, and MORRIS REALTY COMPANY, an Illinois corporation, Defendants.	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
MORRIS REALTY COMPANY, an Illinois corporation, Appellant.	)	

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff was injured as the result of a fall sustained while walking down an allegedly defective stairway which led to a restaurant and night club located on the second floor of premises at 309 East Garfield boulevard in Chicago. She brought an action to recover damages against Frank Lowery, individually and doing business as The Cafe de Society, lessee of the entire second floor, also Morris Investment Company, managing agent in charge of the premises, and Morris Realty Company, owner thereof. Lowery filed an answer to the original complaint which was subsequently stricken. He filed no further pleading, nor did he appear at the trial of the case except as a witness for plaintiff. An order was entered at the conclusion of the trial declaring him in default, and the jury was directed to return a verdict against him, and assessed plaintiff's damages in the sum of

$2500.00. The jury also returned separate verdicts against the other defendants, assessing plaintiff's damages in each instance in the sum of $2500.00, and separate judgments were thereupon entered against all of the defendants for the sum of $2500.00 and costs. The jury also affirmatively answered a special interrogatory submitted to it as follows: "Was the defect in the stairway that the plaintiff claims caused her accident known to Frank Lowery at the time of the assignment of the lease from Louis Burrell to Frank Lowery?" Motion of the defendant Morris Investment Company for judgment notwithstanding the verdict against it was granted. A like motion of the defendant Morris Realty Company was overruled. Morris Realty Company appeals from the judgment against it and the order overruling its motion for judgment notwithstanding the verdict against it.

The entire second floor of the building located at 309-17 East Garfield boulevard in Chicago was leased to Louis Burrell for the period from May 1, 1944 to April 30, 1947 under a written indenture of lease dated December 11, 1943. On December 15, 1944 Morris Realty Company acquired title to the premises in trust. Morris Investment Company managed and controlled the entire building for Morris Realty Company. The lease to Burrell contained the following covenants on the part of the lessee: "Second.--That he has examined and knows the condition of said premises; and has received the same

in good order and repair, and that he will keep said premises in good repair during the term of this lease, at his own expense; and upon the termination of this lease will yield up said premises to said party of the first part in good condition and repair (loss by fire and ordinary wear excepted). Third.--That he will not sub-let said premises. nor any part thereof, nor assign this lease without the written consent of the party of the first part first had."

November 10, 1945 Burrell executed a written assignment of the lease to Lowery, with a written consent thereto by Morris Investment Company as follows: "We hereby consent to the assignment of the within Lease to Frank Lowery on the express condition, however, that the assignor shall remain liable for the prompt payment of the rent and performance of the covenants on the part of the second party as therein mentioned, and that no further assignment of said Lease or subletting of the premises or any part thereof shall be made without our written assent first had thereto." By further rider attached to the lease, also dated November 10, 1945, it was provided that there was to be an additional payment of rent per month for the balance of the leasehold term, and that "all other conditions contained in said lease are to remain in full force and effect." The lease provided that the lessee was to use the premises for purposes of entertainment if he so desired, and the premises were so used; a night club was maintained there

with "music, entertainment, suppers, dinners, etc." A neon sign facing the street invited the public into the premises, which were known and advertised as The Cafe de Society.

There was no elevator to the second floor. The only access from the ground floor through the front entrance of the building was by means of a stairway with a middle landing, made up of small tiles. Each of the steps leading to the second floor consisted of a slab of marble or tile. The one which caused plaintiff to fall had become defective through disintegration. There were three lights in the stairway, one at the bottom, one at the middle landing, and one at the top. The lighting was under the control of the tenant, who paid the bill for electricity.

On the evening of June 13, 1946 plaintiff, accompanied by her friend Lura Johnson, visited the cafe, where they had a highball and dinner, for which they paid. Upon leaving the cafe between two and three o'clock in the morning plaintiff caught her heel on the defective step and fell. She testified that there was a light on the stairway, but slightly behind her, so that she could not see the steps clearly, that her foot skidded on the gravel of the defective step, and that she fell and was injured.

The sole question presented is whether the judgment against Morris Realty Company should stand. Inherent

in this inquiry is the question whether it had control over the stairway involved. There is no proof that the stairway served as access to any part of the building except the cafe on the second floor. In fact the entire floor was originally leased to Burrell, and subsequently by assignment to Lowery, who was in possession at the time of the accident. Lowery agreed to perform all the conditions and covenants of the lease which, when read in its entirety, placed him in control of the stairway. There is no evidence to support a recovery of plaintiff against either of the corporate defendants upon the theory of a common stairway, and the court refused to instruct the jury with reference to any recovery upon such a theory. In Woods v. Lawndale Enterprises, Inc., 302 Ill. App. 570, the court approved the general rule that "a landlord is not liable for injuries on premises leased to a tenant and under the tenant's control." Certain exceptions to this rule are enumerated in West Chicago Masonic Association v. Cohn, 192 Ill. 210, as follows: "The owner of leased premises may be made liable for such injuries (a) if the covenants of the lease require that he shall keep the premises in repair; (b) if the dangerous or defective condition by which the injury was occasioned existed when the premises were leased; (c) if that which occasioned the injury was a nuisance and was upon the premises when the lease was executed."

See also Jackson v. 919 Corporation, Illinois Appellate Court No. 44885, filed October 25, 1950, and decisions cited therein on this point. In the case at bar the covenants of the lease required the tenant to keep the premises in repair; moreover, the jury, by affirmatively answering the special interrogatory, found that the defect in the stairway was known to Lowery at the time of the assignment of the lease from Burrell. The only theory upon which the landlord could be held liable is that there was a hidden defect known to it but not to the tenant. The specific interrogatory negatives this possibility.

In the recent case of Elbers v. Standard Oil Co., 331 Ill. App. 207, the court followed the principle holding a tenant in control of the premises liable for injuries to third persons, and rejected substantially all the contentions advanced in the case at bar by plaintiff. Quoting extensively from volume 16, Ruling Case Law, the court concluded that within the settled general rule, the duties and liabilities of a landlord to persons on the leased premises by the license of the tenant are the same as those owed to the tenant himself; such persons, for this purpose, stand in his shoes. The court adopted the reasoning of Ruling Case Law to the effect that visitors, customers, servants, employees and licensees generally of the tenant are on the premises as guests of the tenant and not of the

landlord; that with respect to the liability of a landlord to the licensees, etc. of the tenant for injuries received due to defects on the premises existing at the time of the lease, the landlord does not, by making the lease, impliedly warrant that the premises are safe or fit for the use to which the lessee may intend to put them. The court differentiated between licensees and third persons who are strangers by again quoting from Ruling Case Law (same volume, heading, "Liability to Strangers") to the effect that third persons, standing on their rights as strangers, unlike licensees, servants and guests of the tenants, do not derive their right to be where they are from the tenant, and therefore the measure of the duties owed by the landlord to them is not the same as that of his duties to the tenant. The court ultimately concluded that plaintiff, who was a customer of the lessee, was a licensee and had no greater rights than the lessee himself; that plaintiff was not a third party or a stranger; and that therefore his right of recovery against defendant, the lessor, was the same as that of the lessee, had he suffered the injury. See also Jackson v. 919 Corporation, supra. In the case at bar, plaintiff and her friend were clearly licensees and had no greater rights than Lowery, the lessee; they were not third parties or strangers.

Accordingly, we are of opinion that the court should have decided, as a matter of law, that Morris Realty Company was not liable, and allowed its motion

for judgment notwithstanding the verdict. For its failure to do so, judgment is reversed, and the cause remanded with directions that judgment notwithstanding the verdict be entered in favor of the appealing defendant.

Judgment reversed and cause
remanded with directions.

Schwartz, P. J., and Scanlan, J., concur.

45196

LENA KOHLER, Appellant,	)	
v.	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
MARCUS A. COLBERG and BIRT CALKINS, Defendants.	)	
BIRT CALKINS, Appellee.	)	

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendants, charging assault on her by defendant Colberg while acting as the agent of defendant Calkins. Colberg died before the trial and the action abated as to him. At the conclusion of plaintiff's evidence, the court directed a verdict for defendant Calkins. The question before us, therefore, is whether there is sufficient evidence offered by plaintiff, which taken with its favorable intendments, tends to prove the charge of the complaint. Neering v. I. C. R. R., 383 Ill. 366.

For some time prior to the date of the occurrence in question, there had been difficulties between the tenant, plaintiff, and the landlord, defendant. It appears that monthly the landlord would himself or by an agent appear to collect the rent, and sometimes announce his coming by kicking on the storm door. Plaintiff had made complaint to the O.P.A. several times concerning the apartment. She testified that February 1, 1947, Calkins told her he had engaged some one "to throw you out in the alley." One of her sons

testified that Calkins said, "You people need a good licking and you are going to get it." It was with this background that Colberg was engaged by defendant Calkins, who testified, "I employed him to get the Kohlers, the people in there on the botton floor, out." He agreed to give Colberg $50 down and $50 more when they were evicted. Colberg first came to the apartment on February 10, 1947. Mrs. Kohler gave him $25, whereupon Colberg pulled out a 5-day notice, which appears as Exhibits 3 and 4. In a blank space on this notice, he wrote a receipt for the rent due. Why he should have used such a document for a receipt does not appear. If plaintiff should argue that it was for the purpose of disturbing and exciting her, we cannot say that she would be unwarranted in so doing. It also contained an authorization by Calkins to pay the rent to Colberg. It was signed "Birt Calkins, Landlord, by Marcus A. Colberg, Agent or Attorney." On the reverse side was a stamp, "Marcus A. Colberg, Real Estate and Insurance." March 1, 1947 Colberg again came to the Kohler premises and being handed the rent due, drew another 5-day notice from his pocket. This confused Mrs. Kohler, who called her son Vincent. Some heated discussion followed and according to the plaintiff and her son, Colberg struck her son in the eye and when she attempted to push Colberg away, he threw her down the rear stairway, causing the injuries complained of.

A principal is liable for the negligence of his agents and for their negligent, wanton and wilful acts in the line of their employment and in the course thereof while pursuing the business of the principal. Carlberg v. Spiegels House Furnishing Co., 178 Ill. App. 424; Metzler v. Layton, 373 Ill. 88; Standard Brewery v. Nudelman, 172 Ill. 337. Defendant argues that Colberg was employed as an attorney; that an attorney is an independent contractor and that defendant is therefore not liable for any method he may have used to accomplish the purposes for which he was employed. The exact role of an attorney as affecting the liability of a client for acts such as are here complained of has not been defined, although the general relationship is that of agency. There seem to be no cases directly in point -- a credit to the profession and proof of its general observance of the law. We deem it unnecessary to consider that question in this case because there is sufficient evidence offered on behalf of plaintiff to sustain her position that Colberg was not engaged solely as a lawyer. Colberg, whether he was a lawyer or not, was also a real estate and insurance man and on the occasion in question he could well have been acting in the capacity of a real estate agent. The court should not have directed a verdict.

Judgment reversed and cause remanded for new trial.

Reversed and remanded.

Friend and Scanlan, JJ., concur.

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45114

LOUISE MUELLER, Appellee,	)	
v.	)	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
WALTER F. WEILAND and EDWIN W. H. OTTO, Appellants.	)	

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a complaint in chancery for discovery, an accounting, and the return of documents, monies and securities alleged to have been obtained from her by defendants as her agents and beneficiaries. After hearing exceptions to the master's report, the chancellor entered a money decree against defendants in the total sum of $49,597.08 and costs. One of the defendants, Mrs Lucia Kramer, was dismissed out of the case in the decree. Weiland and Otto have taken an appeal.

The essential facts taken from a record of more than 1000 pages and numerous exhibits disclose that on January 25, 1944, plaintiff, a widow then nearly eighty years old, fell and was injured in her apartment, and was hospitalized until April 4, 1944. In the latter part of March and while still in the hospital, she telegraphed or telephoned the defendant Walter F. Weiland, her nephew, to come to Chicago. He resided in Lincoln, Nebraska, where he was an associate professor in the Department of Mechanical Engineering of the University of Nebraska. Upon his initial visit at the

hospital, his aunt expressed the desire to return to her home. He engaged the services of another doctor, and several days later, when he was able to arrange for a practical nurse, Mrs. Lucia Kramer, to take care of his aunt, he made plans to have her taken to her apartment. Shortly thereafter she began to sit up. She told Weiland that she did not know how she could attend to her affairs, and wanted him to help her. Weiland, who had to return to the university, called in an old friend of his, Edwin W. H. Otto, the other defendant, and requested him to be of assistance to his aunt. She told both Weiland and Otto that she was having trouble with her relatives. She had obtained a judgment for $2000.00 against her deceased husband's brother, and claimed that one of her nephews and his wife had taken about $13,000.00 in cash and securities from her home and refused to return them. At her request Weiland retained an attorney, Mr. Oscar Neumar, who recovered the assets, which amounted to about one-fourth of what she claimed.

Shortly after plaintiff's arrival home she had a discussion with Weiland about her securities. She told him that she did not know how she would be able to take care of her business, such as redeeming bonds, cashing coupons, making repairs on buildings which she owned, and other business matters. Weiland suggested that she open a checking account, which would facilitate

the payment of her taxes and other large items, and he assured her that he would help her in every respect. She agreed to this arrangement, and told Weiland that she had some cash in two safety deposit boxes which she thought aggregated about $3000.00. Weiland then made arrangements with the First National Bank of Chicago, where plaintiff maintained one of her safety deposit boxes and where she also had a savings account, to open a checking account in such a way that he also would have authority to sign checks. After procuring a form from the bank Weiland took it out to his aunt, had her affix her signature, and then returned to the bank to complete the opening of the account. At the same time plaintiff signed a power of attorney, as well as a power enabling Weiland to enter her safety deposit box at the First National Bank, and subsequently she authorized him to enter her deposit box at the Northern Trust Company. Weiland and Otto went through the boxes. One box contained $15,000.00 in cash, which was five times the amount she had told him was there. Otto prepared an inventory, of which Weiland made a summary. He wanted to make a copy of it for his aunt, but she told him that would be unnecessary since she knew what was in the boxes. Plaintiff had some $2600.00 in coupons and $3370.00 in cash around the house. Following Weiland's first visit, Otto deposited the cash and the proceeds of the coupons in her checking account. Before Weiland's

departure on his first visit, plaintiff gave him the keys to her two boxes.

Weiland went back to Lincoln after about eight or ten days in Chicago, and did not return until May, and then stayed for only two days. His third visit to Chicago was around June 10, when plaintiff had an eightieth birthday party at her home. At that time he told her that the Otis Steel Company bonds would be called on July 15, and that he would not be able to be in Chicago at that time. In accordance with her instructions he took the bonds with him to Lincoln to purchase government bonds with the proceeds. At her request he had all the government bonds changed which had been held jointly by her and Richard Mueller, one of her nephews; she wanted them issued to her and Weiland as joint owners.

June 5, 1944, shortly before her eightieth birthday, plaintiff telephoned Otto to come to see her. He testified that she told him she wanted to give Weiland some money. Weiland was her closest blood relative, the son of her brother, and she desired to talk over the gift with Otto. Otto was in the insurance business, and had some knowledge about taxes. He told her she could give Weiland up to $30,000 as a cumulated gift in that calendar year, free from gift tax, and also $3000.00 in addition, likewise free from tax, and that thereafter she could give him $3000.00 annually. Otto

recommended that she put it off for a couple of days and give some thought to the matter. The following day she telephoned him and said that she had come to a decision. He came to see her at her request. She informed Otto that she wished to give Weiland $33,000.00, and asked Otto to withdraw that amount from the bank and bring it to her. He told her, however, that he would not carry that much money, and suggested that she make the gift in the form of a check. Her nephew had left her some blank checks for use in an emergency, and after Otto had the check typed and protectographed at his office and brought it back to her, she signed it in his presence and with his pen. She then handed the check to him with the remark, "Now, you give this to Walter. * * * Walter has done so many things for me, and this is one way what I can repay." But Otto replied, "When Walter comes in here on Sunday, you give it to him. * * * It's going to mean a lot to Walter if it didn't come second handed through me," and the check was left with plaintiff.

During the course of the birthday party, which was held on Sunday afternoon, Weiland showed Otto the $33,000.00 check and the following Monday Weiland, through Otto, purchased some insurance policies, with his family as beneficiaries, and Otto again saw the check on that day.

Early in March 1945 Otto brought plaintiff a Gift Tax Return, which she signed and swore to before a neighborhood notary public who had come to plaintiff's

home at Otto's request. In the meantime, on January 15, 1945, plaintiff had given Weiland an additional check for $3000.00. This did not require a gift tax report to the government, and none was made.

After Weiland and Otto had examined the safety deposit boxes in April 1944 they deposited in plaintiff's checking account the $15,000.00 in cash taken from the First National box. War bonds, totaling $15,000.00, which were past due, were brought to plaintiff's home at her request, and kept there until April 7, when Weiland and Otto took the bonds to the Federal Reserve Bank for redemption. The proceeds were not returned for a month or so, and were ultimately also deposited in plaintiff's checking account. Otto's inventory on first inspection showed that the boxes contained various bonds and securities of the face value of approximately $95,000.00. Most of the bonds, as shown by the schedules introduced in evidence, were not registered, and were therefore negotiable.

After the joint checking account was established in April 1944 Weiland paid plaintiff's current bills by means of checks signed "Louise Mueller by Walter F. Weiland," some 120 in all, aggregating approximately $14,000.00. These payments covered repairs for plaintiff's property, fees paid to her nurses, physicians and attorneys, State and Federal taxes, and miscellaneous items for which plaintiff had become obligated. During

that period of time Weiland made about eight or nine trips to Chicago to visit plaintiff and to consult with her about investments and other matters pertaining to her personal affairs, and the pleasant relationship between them continued during this entire period, as indicated by letters exchanged between them, mostly of an endearing and personal nature.

In the latter part of January 1946, for the first time in approximately two years, plaintiff felt that she was well enough to inspect her safety deposit boxes, and she testified that "when I came to it [the safety deposit box] there was hardly nothing there any more, all of the bonds were gone, all of the money was gone when I went there," and on February 23, 1946 she wrote a letter to Weiland asking him to send her "at once all my Bank books canceled checks and records and all my Bonds and Money taken from my Bank boxes." She first testified that she never saw Weiland after that, but later on cross-examination admitted seeing him twice in January 1946, and it clearly appears from the record that he was in Chicago on January fourth and fifth, 1946, that he visited plaintiff at her home and discussed with her matters pertaining to her affairs. However, her visit to the safety deposit boxes brought about a complete change of attitude toward Weiland, and the hatred and suspicion which she had formerly entertained toward her other relatives she apparently transferred to Weiland, and likewise to Otto and Mrs. Kramer, whom she regarded as having been in league with Weiland to take

her cash and securities, and on January 25, 1946, some six days after she had inspected her safety deposit boxes, this suit was instituted.

Her statement that when she visited the vaults in January 1946 "there was hardly nothing there any more, all of the bonds were gone, all of the money was gone," is untrue. James A. Russell, one of her lawyers, who instituted this suit, testified that "on January 19, 1946, I again visited the box, the safe deposit vault box; at that time an inventory was made. Those present were yourself [Mr. Ryer, attorney for Weiland], Alfred F. Beck [plaintiff's present counsel], Theodore Mueller [the brother of plaintiff's deceased husband] and myself. And a complete inventory of the entire contents of both boxes was at that time made by Alfred F. Beck [who is even now plaintiff's attorney], * * * and we found the bonds Otto claims were still actually there, in the box, and the absent bonds are those noted in Plaintiff's Exhibit 9 as being in the possession of Mr. Weiland." The inventory which Russell then made checks with the inventory (Exhibit 9) which Otto had prepared on his first visit to the safety deposit boxes with Weiland, except for some bonds which were in the possession of Weiland, such as the matured Otis Steel Company bonds, and possibly others that he had taken to Lincoln for the purpose of redemption or reinvestment. That neither Weiland nor Otto appropriated any of plaintiff's cash or

securities to themselves is clearly indicated by the report of Thomas B. Lantry, the master, who made a careful and searching analysis of the testimony. He found, and there is no evidence to the contrary, that Weiland received or had control of property and assets belonging to plaintiff of the face value (not including coupons or interest thereon) of $94,557.50, all of which were itemized in his report; that he received other assets consisting of cash turned over to Otto by plaintiff, proceeds of the sale of stock, interest on government bonds and coupons, aggregating $11,001.22, and interest coupons on bonds received by Weiland or over which he had control amounting to $3630.00. Thus the total assets received by Weiland, including cash and securities, aggregated $109,588.72. As against these total assets, the master set forth in great detail the disposition that Weiland made of the property that came into his hands. The total credits amounted to $107,402.47, leaving a deficit of only $2186.25, which the master charged against defendants, then added $300.00 which Weiland had claimed as traveling and hotel expenses on his various visits to Chicago, for which he had not accounted in detail, making a total of $2486.25, which the master recommended as the amount of the money decree that should be entered against defendants, and which they are willing to pay. None of the parties or counsel seem to be able to explain the discrepancy of $2186.25, but there is no evidence that either Weiland or Otto mis-

appropriated any part of this sum.

We now come to a consideration of the claimed gifts totaling $36,000.00 in the form of two disputed checks, which are admitted to constitute the principal controversy between the parties. In the court's decree these two checks, aggregating $36,000.00, were charged against defendant, contrary to the master's recommendation, and together with $10,300.00 interest, the discrepancy item of $2186.25, and $300.00 in traveling expenses, aggregate substantially $50,000.00.

In her complaint plaintiff proceeds on the theory that Weiland, "under the pretense of being solicitous for the welfare of the Plaintiff, but for the real purpose of defrauding the Plaintiff and of obtaining possession of her property," won her confidence and trust; that she was deceived and reposed implicit trust and confidence in Weiland, and "in his supposed honesty and integrity"; that upon the representation that it would be for her comfort and convenience, but for the real purpose of concealing his actions and designs, he persuaded plaintiff to surrender the passbooks of her savings and checking accounts, and also her checkbooks, and arranged to have all bank statements sent to him. She alleged that during the interval between April 6, 1944 and January 10, 1946 Weiland wrongfully removed from her safety deposit boxes negotiable securities of the face value of from $77,000.00 to $80,000.00, and obtained cash and interest coupons from the safety deposit

boxes and from plaintiff in sums aggregating $68,000.00 to $70,000.00, "making a total defalcation of from $145,000.00 to $150,000.00, the exact amount being susceptible of determination only upon an accounting." None of these allegations are sustained by the evidence adduced upon the hearing.

In a schedule attached to his answer Weiland set forth in detail the contents of the safety deposit boxes when he first inspected them on April 6, 1944, showing cash and securities amounting to $94,740.00, and the disposition thereof. Some of these securities remained in the safety deposit boxes, as Mr. Russell testified; other securities were shown to be in the possession of either plaintiff or defendant Weiland. But there is no substantial discrepancy in the schedules. In schedule D of Weiland's answer he shows the two checks, purported to have been signed by plaintiff as gifts to him, aggregating $36,000.00. The issue of forgery was not introduced into this case until plaintiff filed her reply to Weiland's answer, asserting that "neither check was signed by her, neither was a gift to the defendant Weiland but on the contrary represent funds converted by the said Weiland in violation of his fiduciary duties to the plaintiff." Thus, when the cause came on for trial before the master, the issue resolved itself into the question of whether the two checks were genuine or forged. The master found that they were genuine, and that they constituted gifts by plaintiff to Weiland.

After a careful examination of the record we have reached the conclusion that both of these findings are amply supported by the evidence. From the testimony of Otto and Mrs. Kramer, it seems clear that the idea of a gift to Weiland originated in plaintiff's mind. There is no evidence whatsoever to warrant the conclusion that Weiland had ever mentioned or broached the subject of a gift to plaintiff. She had called him to come from Nebraska to help her manage her affairs at a time when she was incapacitated and unable to attend to them herself. Her family and her husband's family evidently were estranged. They were under her suspicion and hatred. She had not seen much of Walter Weiland, and therefore had not yet begun to hate and suspect him. He was the only one of her relatives she trusted, and she evidently decided to make him a substantial gift. Her feeling toward him at that time was further evidenced by the fact that almost concurrently with the making of these two checks she executed a will in which she devised and bequeathed all her residuary estate to Weiland, and the master took this into consideration in finding that the checks were bona fide gifts.

Upon hearing before the master plaintiff categorically denied that she had signed either of the checks, the one for $33,000.00 or the one for $3000.00. When the $33,000.00 check was shown to her, she said, "I did not sign that. I did not sign that"; and when the $3000.00 check was exhibited, she asserted, "No, that

is not my signature. It is not mine." Subsequently, on cross-examination, she reiterated her denial, and said that "he [Weiland] forged that check, forged that check, why sure, I didn't give the check for $33,000. How he forged it I don't know. I don't know. I didn't sign it. I don't know who signed it, but I didn't have no more money in the bank and nothing in the box either. I don't remember how much money I had in the checking account." After comparing plaintiff's known genuine signatures with those on the checks, one handwriting expert gave it as his opinion that the signatures were genuine; another expert was of a contrary opinion. To a nonexpert the signatures on the checks, which were described by both experts as having been freely written and not traced, bear a striking similarity to all of plaintiff's genuine signatures, many of which are in evidence. Moreover, Otto testified that he had prepared the checks in his office, and that plaintiff signed them in his presence and with his fountain pen. In the very recent will case of Jones v. Jones, 406 Ill. 448, it was held that the testimony of experts is at best "secondary evidence, merely an opinion as opposed to a positive fact, and however expert the witness may be, he is not giving voice to any direct statement of fact capable of proof, but only the opinion of what he thinks the alleged differencesin the signatures disclose." (Italics those of the Supreme Court.)

However, the truth or falsity of plaintiff's testimony with respect to her signature does not depend alone on what she said. We think its falsity is clearly demonstrated by her Gift Tax Return. It appears that in the course of her testimony plaintiff, on cross-examination, was shown an instrument which she had signed and acknowledged before a notary public on March 7, 1945, scheduling a gift of $33,000 to Walter F. Weiland, donee. Before this instrument was exhibited to her, plaintiff said, "I did not make such a return. I didn't make such a return in January 1945. I didn't. I didn't give any. Your statement that such a return is on file does not refresh my memory." The return has a heading in large type, "UNITED STATES GIFT TAX RETURN, CALENDAR YEAR 1944." When it was shown to her, she admitted signing it, but asserted that "Walter was here and he made me sign that gift tax. Walter Weiland. Right here in the house. I did sign it. Walter made me sign it." And she repeated over and over again that Weiland had made her sign it, presumably to strengthen her claim that after winning her confidence and trust, Weiland had violated his obligations as a fiduciary. She admitted reading the legend "GIFT TAX" in large type, but said she thought that "maybe it is rent or something like that." As against this testimony, we have the categorical statement of Weiland that he was not present when the gift tax was signed. Otto related in detail the events that led to her signing the instrument, and stated that only he and the notary public, whom

he had requested to come to plaintiff's home, were present when the Gift Tax Return was signed. The notary, Einar C. Carlson, a disinterested witness, said that Otto called him at his home the morning of March 7 and asked him if he could come over to 3848 North Leavitt street, where plaintiff resided, to notarize a paper. He drove over and met Otto at that address. He stated that plaintiff signed the return in his presence, that there was no one present except plaintiff, Otto and himself, and that there was no conversation except what was necessary for the signing, witnessing and notarizing of the document. Plaintiff's counsel do not explain or contradict his testimony, and plaintiff never took the stand to deny what he said. Plaintiff was a woman of means. Besides cash and securities, she had considerable real estate, which is not the subject matter of this litigation. She had undoubtedly filed tax returns on previous occasions, and must have known their significance. Having admitted that she had read the legend "GIFT TAX," her explanation of what she thought it might be is palpably untrue; and realizing this, she was probably driven, in the hope of gaining credence for her explanation, to saying over and over again that Weiland had forced her to sign it.

To support the contention of forgery plaintiff's counsel stresses two points. He says first that the checks, being plaintiff's exhibits 14 and 15, were signed in green ink, "a color and shade existing nowhere else in the record." After oral argument, the original checks,

which were impounded with the Clerk of the Superior Court, were sent to us by defendants' counsel. They are not signed in green ink, but in a conventional blue or black ink. Moreover, we fail to perceive how the color of the ink with which these checks were signed is relevant to the question whether they were forged or genuine. The second point urged is that these checks were taken out of the middle of a checkbook containing fifty checks, numbered serially. Plaintiff's counsel argue that this was an extraordinary procedure; that a person pulling some blank checks from a checkbook for future use would take them either from the beginning or end of the section. In other words, Weiland, in the course of making arrangements for handling his aunt's business affairs on his first visit to Chicago, had given his aunt a couple of checks that were eight down from the top, and by the time he came to her birthday party in Chicago some four weeks later, the serial numbers had caught up with the checks which he had given her, and in fact exceeded them. We certainly do not think this is evidence that the checks were forged. The argument as to both of these contentions is purely conjectural.

In the light of the evidence we think the master could not fairly have held otherwise than that the signatures on the gift checks were genuine, and that they constituted a gift to Weiland. This of necessity would require plaintiff to fall back on the allegations of her original complaint that the fiduciary relationship which

existed between her and her nephew was violated by him, that he became solicitous for her welfare for the concealed purpose of defrauding her, and that he persuaded her to do the things heretofore narrated in order to enable him to commit the alleged frauds. We are still at a loss to determine wherein he abused her trust and confidence. There is no evidence to support that statement. The claim that defendant Walter Weiland made total defalcations of from $145,000.00 to $150,000.00 is absurd. The master found no defalcations, and no evidence was adduced to prove any. The check books and canceled checks are among the exhibits. Every check is accounted for, and the master found, and the record shows, that all the assets that came into Weiland and Otto's hands or over which they had any control were accounted for, except for the small discrepancy of $2186.25, which is not charged as a misappropriation. It would be fantastic to conclude that men who had in their hands cash and securities aggregating $109,000.00 would take $2186.25. All that Otto ever received, or that anyone claims he received, was a $1600.00 commission on the insurance policies which he sold Weiland after the gift was made. The decree does not overrule the master's findings as to the genuineness of the checks, but if the chancellor intended to overrule the master on the issue of forgery, the question of fiduciary relationship is of no importance, because as counsel for defendants state, "Any forger is liable for his tort; it is of no importance whether or not he is a fiduciary."

It is of course conceded that the relationship between plaintiff and Weiland was a fiduciary one, but as we have already indicated, the idea of Weiland's coming to Chicago did not originate with him but with plaintiff, and we think the same may fairly be said with respect to the gifts that she made to him, and the will which was confirmatory of her benevolent interest toward Weiland, and of her intent to reward him. The number of visits made by Weiland certainly do not indicate that he was trying to get into her good graces, let alone get her under his domination. Neither did Otto have anything to gain, and gained nothing in return for all he did, except that he received $1600.00 commission on the sale of insurance policies. Upon the record presented it would be manifestly unjust to saddle him with a judgment of $50,000.00. Before these gifts were made Weiland had visited plaintiff on only two occasions, first, when he was originally summoned, and later, two days in the following month of May, and the record shows that on neither of these occasions did Weiland try to ingratiate himself or make any effort to influence or dominate plaintiff. We have reached the conclusion that upon the evidence presented, defendants acted in good faith, that there was no fraud, no domination, no abuse of trust or confidence.

The legal aspects of this case present no serious difficulty. It is of course fundamental that, assuming the existence of a fiduciary relationship between plain-

tiff and defendants, it was incumbent upon them to prove by clear and convincing evidence that they acted in good faith and did not betray the confidence reposed in them. Our courts have consistently refused to set any bounds to the circumstances out of which a fiduciary relationship springs (see the very recent case of Finn v. Monk, 403 Ill. 167), but they are generally in accord in saying that it includes all legal, domestic, personal and social relations, and also every case in which confidence is reposed on one side and domination and influence result on the other. But the doctrine and rules pertaining to fiduciary relationship should never be permitted to bring about absurd conclusions or inequitable results. A person may be entrusted by a close relative with his money, investments and other assets, yet the person who imposes the confidence has the right to make a gift to the fiduciary if it is made without the assertion of domination and influence. Masterson v. Wall, 365 Ill. 102; Allen v. McGill, 311 Ill. 170; and Winkelman v. Winkelman, 307 Ill. 249. Assuming that plaintiff had the capacity to make a will naming Weiland as her heir--and no one questions that--or had the capacity to make a gift and did make him a gift, then if the idea of a legacy or gift originated in her mind and represented her wish, and she made the gift freely and of her own accord, her act and deed will be sustained by the court. Each case must be decided on its own facts. A scrutiny of Weiland and Otto's acts does not even suggest fraud or domination.

We think they fully met the burden cast upon them of establishing the gift by clear and convincing evidence.

It is fundamental, of course, in cases where a fiduciary relationship exists that the fiduciary must make free and frank disclosure of all relevant facts, that the consideration, if any, must be fair and adequate, and that the principal had independent and competent advice before completing the transaction. However, it seems to us that none of these requirements apply to the circumstances of this case. If plaintiff, in her pleadings and upon trial, had treated these two checks as gifts instead of diverting the trial to the issue of forgery, it would have been competent, and indeed necessary, to adduce evidence as to the value of the estate, which included considerable real estate in addition to the securities already mentioned--this in order to determine the likelihood of her making such a large gift. And directing attention to the checks as gifts rather than as forged instruments would also have required a consideration of her mental condition and an examination of her personality--whether she was submissive, or aggressive, or dominated or dominating; but as already indicated, the trial resolved itself into a question of forgery, and therefore proof as to the validity of the gifts, the only issue of importance raised in the pleadings, was entirely neglected. Under the circumstances the question of free and frank disclosure, adequate consideration and competent advice were not brought into the picture, and did not belong

there. A gift is an impulse of the heart, and assuming that plaintiff was competent to make a gift and knew the extent of her assets, real and personal, and desired to make a gift to her nephew of her own free will, it was not necessary for her to seek independent and competent advice.

Plaintiff was evidently a whimsical old lady, possessed of strong likes, dislikes and suspicions. At the time she summoned Weiland from Lincoln, she suspected her other relatives and trusted him. Later, she became suspicious of Weiland, as she had previously been of her other relatives, and evidently decided to repudiate the gifts and to get back the money she had given Weiland.

We think the record strongly supports the conclusion that the checks were genuine; that they represented gifts from plaintiff to Weiland; that the idea of the gifts originated with plaintiff and that they were freely made by her without any influence or domination on the part of either Weiland or Otto; and that these defendants met the burden cast upon them as fiduciaries of proving that they exerted no influence or domination over plaintiff, but acted in good faith and accounted for all that came into their hands or over which they had control, except the discrepancy of $2186.25. Accordingly, the decree of the Superior Court is reversed, and the cause remanded with directions to vacate the decree and enter one charging defendants only with the respective

sums of $2186.25, the amount of the discrepancy, and of $300.00, representing traveling expenses not accounted for, or a total of $2486.25.

Decree reversed and cause remanded with directions.

Schwartz, P. J., and Scanlan, J., concur.

45126

MANUEL KRUPIT,
Appellee,

v.

J. L. YOUNGHUSBAND, PAUL ROWATT, H. A. YOUNGHUSBAND and WALTER JORDAN,
Defendants-Appellants,

and

ASSOCIATED DISTRIBUTORS, INC.,
Defendant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

On August 30, 1945 plaintiff filed suit against his employer, Associated Distributors, Inc., for commissions claimed to be due him of 2-1/2 per cent on sales in excess of his annual quota of $90,000.00 for the year beginning April 1, 1944, amounting to $3000.00; and later, on November 19, 1946, he filed his amended statement of claim in which J. L. and H. A. Younghusband, Paul Rowatt and Walter Jordan were made additional parties defendant. The individual defendants all denied the employment of plaintiff on the terms stated by him, and they averred in their answers that all sums due and payable to plaintiff were paid to him. After several motions preliminary to trial were made and postponed from time to time, the case was dismissed for want of prosecution, at plaintiff's costs, on October 28, 1947. Subsequently, on July 22, 1949, plaintiff presented a petition in the nature of a writ of error coram nobis asking that the records of the court be corrected by expunging the order

of dismissal, and that the suit be set for trial. To that petition defendants interposed a motion to strike, alleging that plaintiff's petition was insufficient in law to give the court jurisdiction to grant the relief prayed. Pursuant to hearing before Judge Heller, who had entered the order of dismissal for want of prosecution, an order was entered on December 1, 1949 sustaining plaintiff's petition. The individual defendants have taken an appeal from that order.

Plaintiff's petition asking the court to expunge its order of October 28, 1947 dismissing the case for want of prosecution alleges in substance that on June 6, 1947, the cause having theretofore been set for trial on that date, was continued for trial to October 10, 1947; that on September 17, 1947, on motion of attorneys for Associated Products, Inc., the court ordered that the cause be continued generally as to that corporate defendant by reason of bankruptcy proceedings then pending in the District Court of the United States, but through an oversight on the part of the clerk said order was not entered on the records of the court on that day; that on September 22, 1947, on motion of the corporate defendant, the court directed the clerk of the Municipal Court to enter an order continuing the case generally as to the corporate defendant nunc pro tunc as of September 17, 1947, and such order was placed upon the records of the

court by the clerk, "although in an ambiguous fashion"; that September 26, 1947, upon motion of plaintiff, the cause was continued generally as to all parties; that on October 10, 1947 plaintiff did not appear for the reason that the cause had theretofore been continued generally; that apparently, through inadvertence or mistake of the clerk, an entry was made on October 28, 1947, dismissing the cause for want of prosecution, although none of the parties thereto were under any duty to appear before the court on that day; and accordingly plaintiff prayed that the records of the court be corrected by expunging therefrom the order of dismissal entered through inadvertence or error, and that the cause be set for trial on a day certain.

Defendants challenged the sufficiency of the petition by filing their second amended motion to strike, stating that the alleged errors of fact relied upon by plaintiff (a) do not appear upon the face of the record, and (b) were unknown to the court in which the alleged errors were committed, and as additional grounds averred that plaintiff was guilty of laches and that his petition attempted to correct alleged errors of law which were not within the scope of a petition in the nature of a writ of error coram nobis.

Upon these pleadings the court, on December 1, 1949, entered an order sustaining plaintiff's motion to vacate the order of dismissal of October 28, 1947, for want of

prosecution, denying the motion of the individual defendants for rehearing, and fixing the amount of their appeal bond at $250.00.

The controverted issue is whether plaintiff's petition is sufficient to constitute a motion in the nature of a writ of error coram nobis. By interposing a motion to strike, defendants admitted the material allegations of the petition. Paragraph 6 of the petition alleges that none of the parties to the cause were under any duty to appear before the Municipal Court on the day on which the order of dismissal was entered; and that is an admitted fact. If the court had been aware of this fact, it is inconceivable that it would have dismissed the cause for want of prosecution on that day. It has been held that a petition for writ of error coram nobis is designed to remedy situations of that kind. In the early case of Brady v. Washington Ins. Co., 82 Ill. App. 380, and later in Silverman v. Childs, 107 Ill. App. 522, cases were placed on short-cause calendars, and judgment orders were later entered because of the failure to have the cases stricken from the regular calendar. In affirming an order of the trial court setting aside a dismissal for want of prosecution in the Brady case, the court said: "Had the court known, April 30, 1896, when appellee's appeal was dismissed, that it had been taken from the regular calendar and put on the short cause

calendar, and afterward stricken from the latter calendar, but that it had never been stricken from the regular trial calendar and restored thereto, as provided by section 5, quoted, supra, we think it clear that the order of April 30, 1896, would not have been made. In contemplation of law the cause not being regularly on the regular trial calendar did not then stand for trial. The court, in making that order, was misled by the failure of the clerk to strike the cause off the regular trial calendar when he placed it on the short cause calendar. A default of the clerk is one of the recognized grounds for a writ of error coram nobis." The same conclusion, based upon substantially similar reasoning, was reached in the Silverman case where the court, relying on Brady v. Washington Ins. Co., said: "It is evident that this cause was reached upon a call of the regular calendar, and was tried in its order as if it was properly there. The ignorance of the court as to the facts arose from the neglect of the clerk to strike the case off the regular calendar when he placed it upon the short-cause calendar. Such negligence of the clerk is sufficient ground for a writ of coram nobis, and authorized the court to pass upon the motion to set aside the judgment at a subsequent term."

In the case at bar the court was undoubtedly misled by the failure of the clerk to strike the cause off the regular trial calendar when it had been continued

generally by prior order, and that amounted to misprision of the clerk, which is one of the recognized grounds for a writ of error coram nobis. More recently, in Rosenthal v. Wald, 252 Ill. App. 383, the court, quoting from Holbrook v. Lawton, 207 Ill. App. 497, said: "'The tendency of the law in this State is to allow the motion under section 89 whenever it is obvious that the action of the court is based upon the fault (either of omission or of commission) of the clerk of the court.'" We think these cases are controlling, and should be applied to the circumstances before us.

Defendants feel aggrieved because the trial judge did not rule on their motion to strike the petition, and their counsel say that if an order had been entered overruling their motion they could have answered, but upon the record as made they had no opportunity to do so. There is no merit to this contention. It is obvious that defendants never intended to raise any issue of facts, and in fact never asked leave to answer. Their motion raised the legal sufficiency of the petition, and admitted the allegations of the petition which were predicated upon the record. Moreover, the record clearly shows that they have taken an appeal from the order of December 1, 1949 overruling their motion to strike plaintiff's petition. They say the ruling was erroneous, and devote some eight points in their brief in support of that contention. Stripped of all technical verbiage, the sole question

presented was whether the petition presented was sufficient and whether it could be employed as ground for a writ of error coram nobis. As heretofore stated, we think that on the record and under the established rule the petition was proper, and what the court did in effect was to hold that it was sufficient and that it justified setting aside a prior order of dismissal for want of prosecution.

For the reasons indicated the order of the Municipal Court is affirmed and the cause remanded for further proceedings leading to a trial of the cause on its merits.

Order affirmed and cause remanded for further proceedings.

Schwartz, P. J., and Scanlan, J., concur.

45144

VAN HUFFEL TUBE CORPORATION, Appellee,	)	
v.	)	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
SAMUEL M. SHER, d/b/a SAMUEL M. SHER COMPANY, Appellant.	)	

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

On February 16, 1948 plaintiff filed its complaint alleging in substance that it is engaged in the business of manufacturing and selling steel and steel products; that on November 4, November 7 and November 14, 1947, it sold and delivered to defendant various sections of cold rolled shapes (parts) to be used for the manufacture of ironing boards, at the invoice prices, respectively, of $2479.34, $972.94 and $1048.08, or an aggregate of $4498.36; that defendant paid plaintiff on account of said shipments the following sums: December 3, 1947, $1458.91, and December 13, 1947, $972.94, or a total of $2431.85; and that there remained due plaintiff the sum of $2066.51, which defendant refused to pay. After defendant had filed his answer, plaintiff, on October 6, 1948, filed a motion and affidavit for summary judgment, to which defendant filed an answer and a counter-affidavit. Plaintiff's motion for summary judgment was denied, and the cause proceeded to trial before the court without a jury, resulting in findings and judgment for the claimed balance of $2066.51, from which defendant appeals.

It appears from the evidence that on September 18, 1947 defendant mailed an order to plaintiff which enumerated each article of the steel products purchased and the price thereof. The order was received by plaintiff on October 14, 1947, and was returned to defendant with the notation that one-half would be delivered in November, and the other half in December, 1947, and that it was "O.K." for "credit" for the first half of the order. Thereafter plaintiff shipped one-half of the order in November 1947 consisting of multiple-steel units to be used in the manufacture of ironing boards. This shipment was sufficient to make up more than one-half of the entire order of parts for 24,000 ironing boards which defendant contemplated manufacturing when the order was placed. Plaintiff's invoice of November 4, 1947 for $2479.34 stated: "Terms - Net 30 days - $12.40 Discount in ten days." Subsequently plaintiff made another shipment on November 7, 1947 for $972.94, the invoice for which stated similar terms, and later it made two more shipments, on November 14 and 18, the invoices again stating similar terms. Defendant received all the shipments made, checked them and found that they were satisfactory. He accepted the invoices containing the terms, and never informed plaintiff that he was dissatisfied with the terms or that he would not pay the balance of $2066.51.

On account of the first invoice of $2479.34 dated November 4, 1947, defendant paid $1458.91 on December 3,

1947, which was the thirtieth day, and on December 13, 1947 he paid the invoice of November 7 in the sum of $972.94. The half order which plaintiff was to deliver in November was to be sufficient to make up 12,000 ironing boards out of the 24,000 contemplated, and defendant made up from the November shipment 12,318 ironing boards, with some steel products left over. Defendant did not offer to return the surplus parts because of the terms to pay "net 30 days," and in fact paid a part of the bill within the thirty-day period.

December 20, 1947 plaintiff notified defendant in writing that because of his failure to pay the balance of $2066.51 it would suspend further delivery. On December 22, two days later, defendant wrote that on December 11 he had made an arrangement with Milton Greenburger (plaintiff's representative) that plaintiff would complete the order on "sight draft" or "C.O.D." Greenburger testified that he had made no such arrangement, but on the contrary had told defendant's representative, Henry Moses, on December 11, 1947, that if he "would send us a check bringing his account up to date," plaintiff "would prepare the steel and make shipment the following week." Moses admitted that he spoke to plaintiff at the end of December, after defendant had received plaintiff's letter of December 20 informing him that further shipments would be suspended until he paid the balance due, and that he was then told that plaintiff would not ship the merchandise until

defendant had paid the balance. The balance was never paid, as a result of which suit was instituted by plaintiff on February 16, 1948.

By the terms of the agreement one-half of the order was to be shipped in November and the other half in December. Credit arrangements for shipment of the first half of the order were checked and approved by plaintiff on October 16, 1947, some two weeks before the first shipment was made. As we have already indicated, defendant failed to pay the balance due on this first invoice, and thereafter plaintiff notified defendant that it would suspend further shipments because of this default. It is argued by defendant that the contract was indivisible and that this credit limitation changed or added something to the original agreement. However, the contract showed on its face that it was divisible. A pencil notation on the original order showed that credit had been approved by plaintiff only for the first half of the order, which was to be shipped in November. The principal controversy between the parties arises from alleged conversations had between Henry Moses, who transacted all the business for defendant, and Milton Greenburger, one of the Chicago representatives of the plaintiff. Moses testified that prior to the acceptance of the order by plaintiff, he told Greenburger on September 7, 1947 that he required all the parts in order to fabricate the 24,000 complete units. Greenburger denied that any such conversation took place

on that date, and stated that he did not meet Moses until December 10, 1947. Moses testified further that subsequent to the conversation alleged to have been had in September, he typed the order and mailed it to plaintiff. The order shows that plaintiff received it on October 14, and in accepting the order placed thereon the notation, "Credit O.K. for half order, 1/2-November, 1/2-December." The order was thereafter returned to defendant and received by him with the foregoing notations thereon. From these notations it must have been clear to defendant that credit would be given only to the extent of the first shipment, which was duly made, and if defendant did not desire to accept the terms, he had the right to reject them. Nevertheless, it appears that on October 31, 1947 defendant wrote plaintiff's representative in Chicago that he had talked to his consignee "regarding the routing of shipments out of Warren, Ohio," and that they had advised him that "as soon as material is packed, ship regardless of complete shipment--that is, material that is packed daily at the mill," and in this letter defendant had stated that "this method will enable us to speed production and keep our factory busy until the entire shipment arrives." Thus, whatever prior conversation may have been had between the representatives of the two parties, the direction to "ship regardless of complete shipments" indicates that this was a divisible contract, and refutes Moses' testimony that he had advised Greenburger of the necessity of having <u>all</u> the complete parts

at one time.

After defendant had written plaintiff on October 31, 1947 to "ship regardless" of whether it was packed in complete units, plaintiff shipped the first order on November 4 at the invoice price of $2479.34, and the order contains under the heading "Terms" the words "Net 30 days." Thereafter it shipped another order on November 7, 1947 in the amount of $972.34, and further orders on the respective dates of November 14 and 18 in the aggregate amount of $1048.08, all containing similar terms. Upon receipt of the merchandise defendant checked the items, found them to be correct, and accepted them, together with the invoices. He never advised plaintiff that he was dissatisfied with the terms of payment, nor did he offer to return the merchandise because the invoices contained the terms stipulated.

It is urged as the principal ground for reversal that the contract between plaintiff and defendant is governed by section 44 of the Uniform Sales Act (Ill. Rev. Stat. 1949, ch. 121-1/2). The first paragraph of this section reads as follows: "Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts or retains the goods so delivered, knowing that the seller is not going to perform the contract in full, he must pay for them at the contract rate. If, however, the buyer has used or disposed of the goods delivered before he knows that the seller is

not going to perform his contract in full, the buyer shall not be liable for more than the fair value to him of the goods so received." Under this provision of the statute defendant as buyer had the right to reject the first shipments of parts knowing, as he did, that plaintiff, the seller, was not going to make a second shipment until the first was paid for, but he did not do so. Instead, he used the parts that had been shipped, and insisted on the delivery of the balance, knowing the credit limitations which plaintiff had placed upon the order after it was received. Of course, if defendant had used or disposed of the goods delivered in the first shipment before he knew that "the seller [was] not going to perform the contract in full," he would not be liable for more than the face value of the goods received by him, as provided in the statute; but with the plain notations on the original order and the several invoices that credit had been extended only as to the first shipment, plaintiff could not have been unaware that no further parts would be forthcoming until he had paid for the first shipment.

The second paragraph of section 44 reads as follows: "Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate." This provision has no application to the

facts of this controversy because neither of the parties contends that plaintiff delivered to defendant a quantity of goods larger than he contracted to sell, nor did defendant make any attempt to reject the whole or any part of the shipment.

Evidently neither of the parties has been able to find any Illinois decisions applicable to the pertinent facts of this case. However, defendant cites several cases in other jurisdictions and a statement in Williston on Contracts which purport to sustain his position. In Finkelstein v. Morganstern, 144 Md. 387, 124 Atl. 872, defendant gave plaintiff an order calling for delivery at once of fifteen pieces of style 7614 serge cloth and fifteen pieces of style 7301 cloth. The prices were designated and the invoices were payable in sixty days. Plaintiff delivered fifteen pieces of style 7614 cloth, but suspended delivery of the fifteen pieces of style 7301 cloth pending investigation of defendant's responsibility. Finally, after correspondence was exchanged between the parties, plaintiff demanded $2000.00 on account before it would ship the balance. Defendant returned the goods shipped and canceled the order. Plaintiff accepted the cancellation of that part of the order which had not been shipped, but insisted on being paid the contract price for the fifteen pieces of style 7614 cloth which had been shipped. Manifestly this decision is not in point because no credit limitation was indicated until after the first shipment

had been made. Moreover, defendant returned the goods shipped and canceled the order in accordance with the provisions of paragraph 1 of section 44 of the Uniform Sales Act.

In Spring Coal Co. v. Quemahoning Coal Co., 97 Conn. 116, 115 Atl. 635, the court, giving consideration to section 44 of the Uniform Sales Act, said that "in the absence of special provisions of the contract giving defendant the right to refuse future deliveries until past-due payments had been made, it had no such right under the law. * * * The coal was sold on credit and payment was not made a condition precedent to delivery." (Italics ours.) In the instant proceeding, although the contract contained no special provisions as to future deliveries, the notations as to credit made on the original order and in subsequent invoices were known to defendant, who evidently acquiesced therein and accepted the goods.

A similar distinction of the facts exists as to the case of Goodyear Tire & Rubber Co. v. Vulcanized Products Co., 228 N.Y. 118, 126 N.E. 710.

In Williston on Contracts, Revised Edition, Volume III, section 862, at pages 2416-2417, the author quotes from National Knitting Co. v. Bouton & Germain Co., 141 Wis. 63, 123 N.W. 624, as follows: "'If, however, it appears by express terms or by necessary implication from the terms of a contract that the intention of the parties was to make payment of the consideration depend

upon delivery of all the articles, the contract will be held entire, though the consideration may be measured in units and be actually severable'"; and adds: "This is especially true where the contract is for several articles which are to be used together." The facts of the case at bar may be distinguished from the rule enunciated because, by the addition of the credit notations appearing on the original order and later invoices, to which defendant by his subsequent conduct must be held to have agreed, the second delivery depended upon prior payment for the first shipment.

There is some conflict in the evidence as to whether Moses, defendant's representative, offered to return the surplus parts which were not needed to make up the first 12,000 ironing boards. Defendant now contends that he is entitled to recoup any amount from the balance which these parts represented. We do not think that the record would warrant a finding that defendant made a bona fide offer to return these parts until after he was in default and threatened with suit. In Chicago Washed Coal Co. v. Whitsett, 278 Ill. 623, the court, after citing Hess Co. v. Dawson, 149 Ill. 138, said that it was there held that "a defendant, when sued for articles sold and delivered to him by the plaintiff, will not be entitled to recoup damages for a breach of the contract unless he, the defendant, has performed his part thereof or has been ready and willing to do so at the time required," and also that "where the purchaser of articles fails to pay for the

same as he agreed to, the vendor may abandon the special contract and sue and recover in an action of assumpsit for the value of the articles sold and delivered to the defendant."

We think the foregoing conclusions are decisive of the matter in controversy, and therefore other points urged by defendant need not be discussed. We are satisfied that upon the record presented plaintiff had the right to suspend shipment because of defendant's default and to sue and recover the balance of $2066.51 for the merchandise which defendant received, checked and found to be satisfactory.

Accordingly, the judgment of the Superior Court is affirmed.

Judgment affirmed.

Schwartz, P. J., and Scanlan, J., concur.

Abstract

Gen. No. 10427. Agenda No. 16.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY TERM, A. D. 1950.

342 I.A. 302

HOUSEHOLD FINANCE CORPORATION, a Corporation, Plaintiff-Appellee, vs. CLARA A. ANDERSON, Defendant-Appellant.	Appeal from Circuit Court, Du Page County.

WOLFE,-- P. J.

On July 16, 1949, the Household Finance Corporation filed a suit in the Circuit Court of Du Page County, Illinois, alleging that on October 22, 1936, they had procured a judgment by confession against Clara A. Anderson for the sum of $200.00 and costs of suit; and that an execution had been served on Clara A. Anderson on November 7, 1936, and the same returned "no property found." It is further alleged that the plaintiff is still the owner of said judgment; that the same is and remains unpaid in whole or in part, and that there is now due the plaintiff from the defendant the sum of $200.00 and costs with lawful interest on said judgment from October 22, 1936, the date of the judgment herein. The plaintiff asked judgment against the defendant in the sum of $350.00. The complaint is verified.

Gen. No. [illegible]

I N T H E

[illegible]

[illegible]

[illegible]

[illegible]

vs.

CLARA A. [illegible],
Defendant [illegible].

[illegible] -- [illegible]

On July [illegible], 19[illegible], [illegible] filed a suit in the Circuit Court [illegible] alleging that on October [illegible], 19[illegible], [illegible] by confession against Clara A. Anderson [illegible] and costs of suit; that an execution [illegible] Clara A. Anderson on November [illegible], 19[illegible], and [illegible] "no property found." It is further alleged [illegible] is still the owner of said judgment; that [illegible] unpaid in whole or in part, [illegible] plaintiff from the defendant the sum of $[illegible].00 and [illegible] interest on said judgment from October [illegible], 19[illegible], the date of the judgment herein. The plaintiff asks judgment against the defendant in the sum of $350.00. The complaint is verified.

The defendant filed a motion to dismiss the complaint, but the same was overruled, and she then filed an answer. She denies that the plaintiff procured a judgment against her for $200.00, or that there was an execution issued on the same. She denies that judgment was entered on a $200.00 note, but alleged it was on a different note of $280.00. This answer is also verified. The case was submitted to the Court without a jury. The Court found the issues in favor of the plaintiff and entered judgment in its favor for the sum of $350.00. From this judgment the defendant has prosecuted an appeal.

The plaintiff, to maintain its suit, offered in evidence the statement of claim in the former proceeding, the exhibits, and the affidavit attached to the statement of the claim, the note, the cognovit and the judgment entered in that proceeding. The defendant objected to this offer, but the same were admitted in evidence.

It is seriously insisted by the appellant that the note sued upon and the one attached to the complaint are different notes. It is explained by the appellee that the note sued on is for $280.00, but there are credits on it reducing the amount due at the time of the original judgment to $200.00, and that was what the judgment was for, which was the amount due at the time of the former proceeding. The cognovit on the note is as follows: "And the said Raymond E. Anderson and Clara A. Anderson, defendants in the above entitled suit, by Frank J. Komarek, their attorney, comes and defends the wrong and injury, when etc., and waives service of process, and says that they cannot deny the action of the said plaintiff, but that they, the said defendants,

The defendants filed a motion to dismiss the complaint, but the same was overruled, and they filed an answer. The answer denies that the plaintiff [illegible] judgment against them for $200.00, or any other sum, or [illegible] thereon in the amount. The answer also alleges that judgment was rendered [illegible] $200.00 [illegible], but alleged it was on a different date of [illegible]. [illegible] also verified. The [illegible] the court [illegible] judgment. The court [illegible] judgment in the above [illegible] [illegible] judgment. [illegible] judgment the defendants had proceeded [illegible].

The plaintiff, [illegible] the statement of claim in the [illegible], [illegible] and are [illegible] the statement [illegible] note, the copyright and the judgment [illegible] proceeding. The defendant objected to this [illegible] in evidence.

It is stipulated [illegible] the judgment [illegible] and upon and the [illegible] [illegible] different notes. It is conceded by the [illegible] that the [illegible] is for $200.00, but there was [illegible] the amount due at the time of the original judgment is $[illegible], and that was what the judgment was for, which was the amount due at the time of the former proceeding. The copyright on the note is as follows: "And the said Raymond [illegible] Anderson and [illegible] Anderson, defendants in the above entitled [illegible], by their [illegible], their attorney, come and deny the wrong and injury, when etc., and waives service of process, and says that they cannot deny the action of the said plaintiff, but that they, the said defendants,

did undertake and promise, in manner and form as said plaintiff has above complained against them; nor but that the said plaintiff has sustained damages on occasion of the non-performance of the several promises and undertakings in said complaint mentioned, including the sum of ..... Dollars for ..... attorney's fees for entering up this judgment, over and above ..... other costs and charges by ..... about ..... suit in this behalf expended to the amount of Two Hundred Dollars and no Cents; and that said defendants hereby agree that judgment may be entered against them in this behalf for the sum or amount last mentioned, and such costs; and the said defendants further agree that no writ of error or appeal shall be prosecuted on the judgment entered by virtue hereof, nor any bill in equity exhibited to interfere, in any manner, with the operation of said judgment, and that they hereby release all errors that may intervene in the entering of said judgment or in the issuing of execution thereon and consent to immediate execution upon such judgment."

It will be observed that the defendant in this cognovit agrees "that no writ of error or appeal shall be prosecuted on the judgment entered by virtue hereof, nor any bill in equity exhibited to interfere, in any manner, with the operation of said judgment, and that they hereby release all errors that may intervene in the entering of said judgment or in the issuing of execution thereon." The trial court in announcing his decision upon the merits of this case stated that any errors that had intervened in the procurement of this judgment had been

did undertake and promise, in manner and form as said plaintiff has above complained against them; and that the said plaintiff has sustained damages on occasion of the non-performance of the several promises and undertakings in said complaint mentioned, including the sum of .... Dollars for .... and [illegible] fees for entering up said judgment, and also the sum of .... other costs and charges for .... [illegible] .... [illegible] this behalf expended in the course of the [illegible] [illegible] and [illegible] counts; and that said defendants [illegible] [illegible] that judgment may be entered against them in this behalf for the amount last mentioned, and costs; and the said defendants further agree that no writ of error or appeal shall be prosecuted on the judgment entered by virtue hereof, nor any bill in equity exhibited to interfere in any manner with the operation of said judgment, and that they hereby release all errors that may intervene in the entering of said judgment or in the issuing of execution thereon and consent to immediate execution on such judgment.'

It will be observed that the defendant in the cognovit agrees "that no writ of error or appeal shall be prosecuted on the judgment entered by virtue hereof, nor any bill in equity exhibited to interfere, in any manner, with the operation of said judgment, and that they hereby release all errors that may intervene in the entering of said judgment or in the issuing of execution thereon." The trial court in announcing his decision upon the merits of this case stated that any errors that had intervened in the procurement of this judgment had been

waived by the defendant when she signed the note in question.

In the case of Hall vs. Hamilton, 74 Ill. 437 the Supreme Court was considering a case very similar to the one we now have, and in discussing the law relative thereto, we find the following: "On such a record we are unable to comprehend by what rule of law this writ may be maintained. Where the defendant, in the most solemn and deliberate manner, waives of record all errors that may have occurred on the trial of a cause, it would be unheard of to permit him to assign as error that which he had solemnly released of record. It would be an act of bad faith on his part, that justice must forbid, and which we can never sanction. If a party cannot be bound by his deliberate admissions of record in open court, we would be at a loss to know how he could be estopped. After a party has thus deliberately waived all errors, we cannot but feel surprise that the case should be brought to this court, and it must be for purposes of vexation or some other equally wrongful purpose.

"Nor does the fact that the errors were released by his attorney in fact, in the slightest degree change the aspect of the case. There is no pretense that plaintiff in error did not execute the warrant of attorney, and if he did, he solemnly gave authority to him to release the errors as he did, and every principle of good faith and justice requires that he should be bound by the action of his attorney within the scope of his authority. Such has always been the doctrine, and we are not aware that it has ever been controverted; nor do we see how so elementary a principle could be. To hold otherwise would

waived by the defendant when he signed the [illegible] guaranty.

In the case of Hall vs. [illegible], [illegible] the Supreme Court was considering a case very similar to the one at bar, and in discussing the law relative thereto, we find the following: "On such a record, we are unable to comprehend by what rule of law this writ can be maintained. Where the defendant, in the cognovit which he [illegible], waives of record all errors that may have intervened in the trial of a cause, it would be unbecoming of this court to [illegible] error that which he has voluntarily released of record. It would be an act of bad faith on his part, [illegible] and [illegible] he [illegible]. [illegible] by his deliberate [illegible] he [illegible] be [illegible] could be [illegible]. [illegible] the defendant voluntarily waived all errors, [illegible] authorises that the case should be [illegible] this [illegible], [illegible] must be for purposes of [illegible] [illegible] purpose.

"Nor does the fact that the warrant was [illegible] by his attorney in fact, in the slightest degree change the aspect of the case. There is no pretence that plaintiff in error did not execute the warrant of attorney, and if he did, he solemnly gave authority to him to release the errors as he did; and every principle of good faith and justice requires that he should be bound by the action of his attorney within the scope of his authority. Such has always been the doctrine, and we are not aware that it has ever been controverted; nor do we see how so elementary a principle could be. To hold otherwise would

overturn the business of the country, as much, if not the larger portion, of the commerce of the world is transacted through agents of various kinds. The release of errors in this case was as effectual as if made by plaintiff in error in person."

The case of The First National Bank of New Paris vs. Royer, 273 Ill. App. 158, seems to be the one that the trial court had in mind when he rendered his decision, and it follows the law as laid down in Hall vs. Hamilton, supra. The Appellate Court reviews many cases in which the law has been announced, as stated in the Supreme Court case. We think the trial court properly found that any errors, if any, in the procurement of the original judgment had been waived by the defendant when she signed the note in question.

As before stated, over the objection of the defendant, a copy of the former proceedings was introduced in evidence. We think that these exhibits were properly admitted in evidence. We find no reversible error in this case. The judgment of the trial court is affirmed.

Affirmed.

Abstract

No. 10456

In the

APPELLATE COURT OF ILLINOIS

Second District

October Term, A. D. 1950

WILLIAM N. FRYE, INC., an Illinois corporation, Plaintiff-Appellee,	Appeal from Circuit Court, Lake County.
vs.	Honorable Ralph J. Dady Judge Presiding.
JOSEPH G. WEBER and JOS. G. WEBER, Inc., an Illinois corporation, Defendants-Appellants.	

BRISTOW, J. -- This matter arrives here by way of an appeal from the Circuit Court of Lake County, wherein a decree was entered in favor of plaintiff, restraining defendant from engaging in the plumbing, heating and electrical contracting business in the Village of Lake Bluff and City of Lake Forest during any time prior to June 23, 1953.

The complaint for injunction alleges that Joseph G. Weber in his answer claims that his contract of employment with plaintiff when construed in light of plaintiff's interpretation, is against public policy and the laws of the State, and he denies that he has done anything in violation of his contract or that the plaintiff was damaged in any wise as a result of his alleged misconduct.

There was an agreed statement of facts entered into between the parties hereto which was as follows:

" 1. That plaintiff, WILLIAM N. FRYE, INC., is an Illinois corporation engaged in the plumbing, heating and electrical contracting

Abstract

No. 10466

In the

APPELLATE COURT OF ILLINOIS

Second District

October Term, A. D. 1966

WILLIAM V. KEYS, INC., an Illinois corporation, Plaintiff-Appellee,	Appeal from Circuit Court, Lake County,
vs.	
JOSEPH C. [illegible] and [illegible], Inc., an Illinois corporation, Defendants-Appellees.	Honorable Ralph G. Kelly Judge Presiding.

MR. JUSTICE [illegible] delivered the opinion of the court:

The Circuit Court of Lake County, [illegible] entered in favor of plaintiff, restraining defendants from [illegible] building, [illegible] and electrical contracting business in the Village of Lake Bluff and City of Lake Forest during any time prior to [illegible], 1967.

The complaint for injunction alleges that [illegible], under in his answer claims that his contract of employment with plaintiff was consummated in light of plaintiff's interpretation, in contrary to public policy and the laws of the State, and he denies that he has done anything in violation of his contract or that the plaintiff was damaged in any [illegible] as a result of his alleged misconduct.

There was an agreed statement of facts presented [illegible] between the parties hereto which was as follows:

" 1. That plaintiff, WILLIAM V. KEYS, INC., is an Illinois corporation engaged in the plumbing, heating and electrical contracting

business in Lake County, Illinois, with its principal place of business located in the City of Lake Forest, Lake County, Illinois, and it has been so engaged continuously in the plumbing and heating business since the date of its incorporation in 1935, and that prior to the date of incorporation the business was conducted by William Frye individually for a period of approximately forty years, and that in 1944 it entered into the electrical contracting business, which now comprises one-half of its business.

2. That Elsa K. Frye, the widow of William N. Frye, is the principal stockholder of the corporation, as well as president and treasurer; that she actively participates in the conduct of the business and has done so since the date of its incorporation.

3. That the defendant, JOSEPH G. WEBER, entered the employment of the plaintiff as general manager of the heating and plumbing business of the said firm in June of 1940 in accordance with the terms of a contract marked "Plaintiff's Exhibit No. 1", which is attached to and made a part of this stipulation, and that the defendant JOSEPH G. WEBER, continued to act as general manager under said contract except with verbal variations in regard to compensation until on or about the 1st day of October, 1946. That on or about the 1st day of October, 1946, the parties entered into an agreement dated on said date which is marked "Plaintiff's Exhibit No. 2" and is attached to and made a part of this stipulation.

4. Both parties faithfully performed their respective parts of the contract until on, to-wit: December 31st, 1947 when JOSEPH G. WEBER resigned his employment with the plaintiff corporation, but continued for two or three months thereafter in order to break in the new man who was taking his place.

5. In May 1948 JOSEPH G. WEBER incorporated under the laws of the State of Illinois, JOS. G. WEBER, INC., whose business consists in installing plumbing and heating equipment only. It is not equipped to handle servicing of such equipment and accepts no service calls. Its principal and only office is located in Highland Park, Lake County, Illinois. JOSEPH G. WEBER is its president, general manager and main stockholder. Said defendant corporation engages in the heating and plumbing business throughout Lake County, Illinois. Said defendant does not advertise locally in the City of Lake Forest or the Village of Lake Bluff nor carry any listing in the telephone

siness in Lake County, Illinois, with its principal place of business
ated in the City of Lake Forest, Lake County, Illinois, and it has been
engaged continuously in the plumbing and heating business since the date
its incorporation in 1955, and that prior to the date of incorporation
business was conducted by William Dye individually for a period of
proximately forty years, and that in [illegible] it entered into the electric
structing business, which has comprised one-half of its business.

2. That Glen V. Dye, the widow of William V. Dye, is the prin-
cipal stockholder of the corporation, is its president and its manager;
that his actively participates in the affairs of the business and is
since the date of its incorporation.

3. That the defendant, [illegible], entered the employment
the plaintiff as general manager of the heating and plumbing business
the said firm in June of 1961 in accordance with the terms of a contract
ked "Plaintiff's exhibit [illegible]", in [illegible] attached to and made a part
e stipulation, and in the defendant's [illegible], [illegible], was hired to act
general manager [illegible] with verbal [illegible] in [illegible]
d to commence work on or about the 1st day of October, 1962. That
or about the 1st day of October, 1962, the parties entered into an agree-
t dated on said date which is known [illegible] exhibit [illegible]. [illegible] is
ached to and made a part of [illegible] stipulation.

4. Both parties individually [illegible] their respective rights of
contract until [illegible], to-wit: December 31st, 1962 when [illegible]
signed his employment with the plaintiff corporation, but continued for
or three months thereafter in order to break in the new manager who was
ting his place.

5. In May 1963 JOSEPH G. [illegible] incorporated under the laws of
e State of Illinois, [illegible] G. [illegible], [illegible], whose business consists in in-
alling plumbing and heating equipment only. It is not equipped to handle
rvicing of such equipment and accepts no service calls. Its principal
d only office is located in Highland Park, Lake County, Illinois. JOSEPH G.
[illegible] is its president, general manager and main stockholder. Said defendant
rporation engages in the heating and plumbing business throughout Lake
unty, Illinois. Said defendant does not advertise locally in the City of
e Forest or the Village of Lake Bluff nor carry any listing in the telephone

directories or any other directories of the said city and village.

6. The defendant, JOSEPH G. WEBER, received all moneys due him up to and through the year 1946. According to the plaintiff's audit for the year 1947 completed some two or three months after January 1948, defendant, JOSEPH G. WEBER, had the sum of $17,764.67 coming. There was a dispute as to the correctness of this amount. Defendant, JOSEPH G. WEBER, finally agreed to accept said sum. Plaintiff refused to pay him said sum or any sum whatsoever until JOSEPH G. WEBER signed a general release reaffirmation agreement which is marked "Plaintiff's Exhibit No. 3" and is attached to and made a part of this stipulation.

7. During the approximately seven and one-half years of his employment, JOSEPH G. WEBER, as manager of the plumbing and heating business, entered into contracts on behalf of the plaintiff, made estimates, supervised the work of the men employed in the plumbing and heating department of the plaintiff's business, and otherwise came in contact with the general public in reference to the heating and plumbing business. JOSEPH G. WEBER'S actions and conduct in behalf of the business, however, was subject at all times to the approval of Elsa K. Frye.

8. On or about the month of May 1948 the defendant, JOS. G. WEBER, INC., through its general manager, JOSEPH G. WEBER, submitted a bid along with twelve or thirteen other contractors, including the plaintiff, at the request of the architects for Ridge Farm Preventorium, a charitable institution in Lake Forest, for the plumbing and heating work on the Ridge Farm Preventorium in Lake Forest, Illinois. That he was subsequently informed verbally by the architect that he could have the plumbing work. Prior to his signing a written contract or commencing actual work on the premises, he was notified by WILLIAM N. FRYE, INC., by letter, copy of which is attached hereto and made a part of this stipulation as defendants' Exhibit No. 1. Said letter ordered him to withdraw from the job or that legal action would be taken. That in accordance with "Plaintiff's Exhibit No. 4" consisting of two letters which are attached hereto and made a part thereof, JOSEPH G. WEBER withdrew. The job was then awarded to the next low bidder, not the plaintiff, (see defendants' Exhibit No. 2 attached to this stipulation).

directories or any other directories of the said city and village.

6. The defendant, JOSEPH G. [illegible], received all moneys due him up to and through the year 1945. According to the plaintiff's audit for the year 1947 completed some two or three months after January 1948, defendant, JOSEPH G. [illegible], had the sum of $17,704.67 coming. There was a dispute as to the correctness of this amount. Defendant, JOSEPH G. [illegible], finally agreed to accept half sum. Plaintiff's attorney [illegible] to [illegible] sum whatsoever until [illegible] agreement which is marked [illegible] and made a part of this complaint.

7. During the [illegible] year [illegible] employment, defendant [illegible] employed two [illegible] the work on the [illegible] employees [illegible] plaintiff's business, and [illegible] in reference to the building [illegible] and conduct in [illegible] the approval of [illegible].

8. In or about [illegible] 1948 the defendant, [illegible], INC., through its general [illegible] with twelve or thirteen other contractors, including [illegible] requests of the architect for [illegible] tion in Lake County, for the erecting and building [illegible] Trevanstian in Lake [illegible], Illinois. [illegible] verbally by the architect [illegible] signing a written contract [illegible] notified by [illegible] and made a part of this complaint [illegible] ordered him to withdraw from the job [illegible] That in accordance with "Plaintiff's Exhibit [illegible] which are attached hereto and made a part [illegible] The job was then awarded to the next low bidder, one the [illegible] Remarde' Exhibit No. [illegible] to this complaint).

9. That in June 1948 the defendant corporation after receiving at its office a request to bid, it did submit a closed bid, through its general manager, JOSEPH G. WEBER, to Deforest Hulburd, for the installation of a heating system in his residence at 111 Moffett Avenue in Lake Bluff, Illinois. Bids from other firms were not requested and the bid of the defendant was accepted and the heating system was installed by the defendant corporation. The approximate cost of same was $1,600.00.

10. That in July of 1948 the defendant corporation after receiving at its office a request to bid, it did submit a closed bid, through its general manager, JOSEPH G. WEBER, to the architect, for heating and plumbing work on the residence of Marvin Pool at 545 Crab Tree Lane in Lake Forest. That the defendant corporation's bid was accepted and the work was done and completed by the defendant. Plaintiff was not requested to bid on this job. Plaintiff had prior to this time done heating and plumbing work for Marvin Pool.

11. That in April of 1949 defendant, JOSEPH G. WEBER, at his office in Highland Park, Illinois, received a call to come in as a consultant by the general contractor to make preliminary estimates for plumbing and heating work in remodeling the Runnell's residence at 333 North Mayflower in Lake Forest, Illinois. He was awarded the plumbing and heating job on a time and material basis plus twenty-five (25) percent limited by an "upset figure". Defendant corporation thereafter performed the dismantling work necessary in connection with the plumbing and heating systems and in April of 1950 bids were requested by the successor architects for the heating and plumbing work. Plaintiff was requested and did submit a bid on the plumbing and heating work. (See defendants' Exhibit No. 2). The bid was awarded to Weber.

12. In November of 1949, at the request of the architect, after receiving said request at its office defendant corporation through its manager, JOSEPH G. WEBER, submitted a closed bid for the plumbing and heating work on the Currier Building on Elm Tree Road in Lake Forest, Illinois, and its bid was accepted and work commenced. The cost of this work was approximately $1,300.00.

13. That on or about November 15, 1949, after receiving a request at its office, defendant corporation submitted through its manager, JOSEPH G. WEBER, a sealed bid on the plumbing and heating work on the Ryerson residence at 261 Mayflower Avenue in Lake Forest. His bid in the amount of $25,557.00 was accepted; work was started immediately and at the present date is about

9. That in June 1929 the defendant corporation after receiving at its office a request to bid, [illegible] closed bid, through the general manager, JOHN O. [illegible], to [illegible] the [illegible] of a heating system in his residence [illegible] bids from other [illegible] accepted and the [illegible] approximate cost [illegible].

10. [illegible] at the office [illegible] manager, [illegible] the residence [illegible] defendant corporation [illegible] by the defendant [illegible] prior to [illegible].

11. That [illegible] in Highland [illegible] general contractor to [illegible] in remodeling the [illegible] Illinois. [illegible] corporation [illegible] with the plumbing [illegible] by the successful [illegible] requested and did [illegible] Complainant's Exhibit No. 3).

12. In November [illegible] corporation through [illegible] the plumbing and heating work in the [illegible] Forest, Illinois, and has [illegible] work completed. The cost of this work was approximately $[illegible].

13. That on or about November [illegible], 1929, after receiving a request at its office, defendant corporation submitted through its manager, JOHN O. [illegible], a sealed bid on the plumbing and heating work on the [illegible] residence at 281 Mayflower Avenue in [illegible] Forest. [illegible] in the amount of $[illegible] was accepted; work was started immediately and at the present date is about

seventy-five (75) percent completed. WILLIAM N. FRYE, INC. also submitted a bid on this job.

14. That on or about the 1st day of March 1950, after receiving a request at its office, defendant corporation through its manager, JOSEPH G. WEBER, submitted a bid at the request of the architect on the William McIlvaine residence on Westleigh Road in Lake Forest, Illinois, for the installation of a heating system. Defendants' bid was accepted and the work performed. The bid was in the amount of approximately $4,000.00.

15. Defendant corporation through its general manager, JOSEPH G. WEBER, has unsuccessfully submitted bids on approximately a dozen other heating and plumbing jobs located in the City of Lake Forest or Village of Lake Bluff in Lake County, Illinois. Each and every one of the said bids was submitted only after request at the defendants' office at Highland Park.

16. There are approximately ten firms engaged in heating and plumbing contracting businesses, whose work in principally located in the Village of Lake Bluff and City of Lake Forest, and in addition, on large contracts there are a great number of heating and plumbing firms from Chicago and other nearby vicinities who submit bids on the jobs in Lake Forest and Lake Bluff.

IT IS FURTHER AGREED AND STIPULATED by and between the parties through their attorneys that if Joseph G. Weber were a witness he would testify to the facts set forth in "Defendants' Exhibit 2, copy of which is attached to this Stipulation."

It seems obvious from a reading of the foregoing that the defendant has boldly and affirmatively violated the terms of this particular section of his contract which was as follows:

> "Second Party agrees that during the life of this agreement he will not give any aid or comfort to any competitor of First Party and will not enter into any business, either as principal, employee or stockholder, competitive with, or whose interests are inimical to First Party's business, and further agrees that when he leaves First Party's employment he similarly will not enter into competition with First Party within the corporate limits of the city of Lake Forest and the village of Lake Bluff for a period of five (5) years next following leaving First Party's employment."

seventy-five (75) percent [illegible]

a job on this job.

14. [illegible]

a degree or its equivalent [illegible]

[illegible] suitable [illegible]

residence or [illegible]

of a [illegible]

the [illegible]

[illegible]

[illegible] [illegible]

building [illegible]

of land [illegible]

was published [illegible]

15. [illegible]

planning commission [illegible]

village or [illegible]

contracts [illegible]

Chicago and [illegible]

forest and [illegible]

16. [illegible]

through their [illegible]

society [illegible]

is entitled to [illegible]

[illegible] It means service [illegible]

has holding [illegible]

of his country [illegible]

"Social Security [illegible]

he will get [illegible]

Truly and will [illegible]

employes or [illegible]

are insured [illegible]

when he leaves [illegible]

into compulsory [illegible]

the city [illegible]

of five (5) years [illegible]

Both parties performed their respective obligations in their contract of employment until December, 1947, when Joseph G. Weber resigned his employment. For the last year of his employment, the defendant had received in bonus money the sum of $17,764.67.

It might be observed that the defendant as general manager of the plaintiff's business for a period of seven and one-half years, entered into contracts on behalf of plaintiff, made estimates, supervised the work, and was the general public relations chief in contacting the architects, general contractors and the public generally in relation to the plumbing and heating business.

The facts in this case disclose a rank disregard by the defendant of his contractual obligation. Immediately after his termination of relations with plaintiff, Mr. Weber proceeded to take advantage of his former position, and much to the harm and disadvantage of Mrs. Frye, acquired patronage through agencies and persons whose goodwill and acquaintance he had made while in the employment of plaintiff. She had placed her trust and confidence in him. This, he admittedly and notoriously betrayed.

Now he advances the defense that such a restriction is against public policy. Counsel for both plaintiff and defendant are in complete agreement as to the law which governs this case, namely, that covenants of this character may be enforced when; first, they are necessary for the protection of the employer; second, they are not injurious to public interest; third, they are reasonably lim ted in time. We are of the opinion that the Chancellor was correct in his determination that the contract under consideration favorably met all three of these tests and, consequently, was enforceable.

The language used in the case of Jewel Paint and Varnish Co. v. Walter, 339 Ill. App. 343 is applicable to the present situation, and is as follows:

> "(1) The general rules of law relative to restrictive covenants in employment contracts are well established and clearly defined in this State, and it is the law that a restrictive covenant in an employment contract must be reasonable as to time, must be reasonable as to area and must be reasonably necessary to protect the employer's business. The time limitation in the instant case is a period of two years after the termination of employment. The area is twenty-five miles surrounding any store of the employer at the time the employment is terminated. The employer's business at the time appellant's employment terminated, was retailing paint, wallpaper and other like commodities in the cities of Elgin, Joliet, Aurora and Ottawa. The decree

Both parties performed their respective obligations in their contract of employment until December, 1[illegible], when [illegible] employment. For the last year of his employment, the defendant had received in bonus money the sum of $12,[illegible].

It might be observed that the [illegible] little business for [illegible] years and [illegible] trusts on behalf of [illegible] the general public [illegible] contractors and the public generally [illegible] business.

The [illegible] his contractual obligation. [illegible] with plaintiff [illegible] and much to the [illegible] agencies and [illegible] the employment [illegible] this, he admitted [illegible] policy. [illegible] as to the [illegible] notar y [illegible] of the employer [illegible] they are measuring [illegible] caller was correct in his [illegible] favorably met all [illegible] 339 Ill. App. 562 [illegible]

"(1) [illegible] covenants in employment [illegible] clearly defined in [illegible] restrictive covenant is [illegible] as to time, must be reasonable [illegible] necessary to protect the employer's [illegible] tion in the interest over [illegible] termination of employment. [illegible] any score of the employer as the time [illegible] the employer's business [illegible] minority, was restricted [illegible] in the cities of Rock Island, [illegible] and [illegible]

of which he complains restricts him from engaging in the paint and wallpaper business in these four cities and in an area of twenty-five miles surrounding each of them.

"The record shows that appellant's entire business experience was gained in the employment of appellee; that as manager of the store at Elgin, he contacted and secured customers and that the good will which appellee's business there enjoyed, was due to the efforts of appellant. Had appellant gone into some other business or left the territory served by appellee, this good will which appellee's business enjoyed, would have continued, but when he became an employee of a competing business it is reasonable to conclude that some of these customers and some of their business would be lost to appellee."

In the case of Old Rose Distilling Co. v. Feuer, 202 Ill. App. 210, the court used this language which seems appropriate:

"We have here a trusted employee given peculiar opportunities to acquire a position of importance to his principal and of advantage to himself, who, as a condition of being so placed, agrees to refrain from doing that which would harm his principal, and subsequently violates that agreement. Courts will go to extreme lengths to prevent agents or those occupying fiduciary capacities from taking advantage of their position to benefit themselves at the expense or disadvantage of their principal. Here, as manager of complainant's business, the defendant was in a position to make the patronage largely a matter of personal following which he probably could take with him to another place in the neighborhood. Realizing this, it was entirely fair that he should contract not to use this position to harm or disadvantage of the complainant, his principal."

In light of the foregoing, we are of the opinion that the lower court was correct in ~~this~~ his determination that the plaintiff was entitled to the relief granted in the decree entered herein, and that it should be affirmed.

JUDGMENT AFFIRMED.

of which he complains restricts him from engaging in the paint and wallpaper business in these four cities and in an area of twenty-five miles surrounding each of them.

"The record shows that appellant [illegible] perience was gained in the employment of [illegible] of the store at [illegible], he [illegible] the good will which appellant's [illegible] to the efforts of [illegible] business or [illegible] which appellant's business [illegible] when he became [illegible] to conclude that some of [illegible] ness would be lost [illegible]."

In the case of Old Rose [illegible] used this language [illegible]

"We have [illegible] entitled to [illegible] end of adventure [illegible] placed, [illegible] without [illegible] will go to extreme lengths [illegible] fiduciary capacities [illegible] benefit themselves [illegible] principal. [illegible] defendant was [illegible] matter of necessity [illegible] him to another [illegible] was entitled [illegible] tion to build or [illegible]."

In light of the [illegible]

was correct in [illegible] granted in the [illegible].

342 Ill. App. 6

45062

GENEVIEVE MARENO, Appellee,	)	APPEAL FROM
v.	)	SUPERIOR COURT
CHICAGO TRANSIT AUTHORITY, a Municipal Corporation, Appellant.	)	COOK COUNTY.

342 I.A. 443

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Genevieve Mareno filed a complaint in the Superior Court of Cook County to recover damages for personal injuries allegedly sustained when she was thrown from the front platform of a westbound streetcar at Roosevelt Road and Cicero Avenue, Chicago, on July 3, 1947. The action was against the trustees of the corporation doing business under the name of Chicago Surface Lines. During the trial the Chicago Transit Authority, a municipal corporation, was substituted as defendant. A trial resulted in a verdict for plaintiff, assessing her damages at $7,500, upon which judgment was entered. A motion for judgment notwithstanding the verdict and in the alternative for a new trial was filed by defendant. After requiring a remittitur of $1,500, which was accepted by plaintiff, the court denied the motions and entered judgment for $6,000. Defendant appeals.

The first point advanced by defendant is that the verdict is against the manifest weight of the evidence. On Thursday, July 3, 1947, at about 9:30 a.m. plaintiff boarded a westbound streetcar at Roosevelt Road and Francisco Avenue, Chicago, on her way to work. She intended to get off at

Cicero Avenue and transfer to another car. Roosevelt Road runs in an easterly and westerly direction and Cicero Avenue runs in a northerly and southerly direction. At the time of the trial plaintiff was 28 years of age. She testified that she sat in the center of the car on the south or left side; that when the car was about three stops before Cicero Avenue she walked to the front platform, preparing to alight at Cicero Avenue; that a lady in front of her got off the streetcar two stops east of Cicero Avenue; that after this lady got off, plaintiff stepped up to the door; that she held on to the bar on the left side of the door with her left hand; that about 50 or 60 feet before the regular stop at Cicero Avenue the motorman "threw open the door" and applied the brakes; that the car shook, swayed and lurched and threw her off of the platform; that her back hit the step and she landed on the pavement in a sitting position with her left knee under her; that a man who had been standing on the platform got off and attempted to help her but could not do it by himself, so the conductor "grabbed a hold of her" by the other arm and between the two of them they half carried her and she half walked to a physician on Cicero Avenue a little south of Roosevelt Road. On cross-examination, plaintiff testified that no other lady got off at Cicero Avenue; that the lady got off two stops before Cicero Avenue; that the car did not make a regular stop at Cicero Avenue; that it started to stop about 50 or 60 feet east of Cicero Avenue; that the motorman

opened the door about that time; that when he applied the brakes she was thrown off; that she would not know just exactly how many feet east of Cicero Avenue that she was "thrown from the car" but the car stopped about 20 or 30 feet east of the building line of Cicero Avenue; that she was holding on to the left bar with her left hand; that the car started to lurch and she was thrown to the north onto the pavement from the platform and fell in a sitting position; that she had both feet on the platform when she was thrown off; that she never touched the step; and that she would not say whether she was immediately opposite the step after the car stopped, when she was on the pavement.

Carl Ahlgren, an employee of the American Railway Express Company, testified that he boarded the car at about 9:00 a.m. at Michigan Avenue and Roosevelt Road; that he took a seat close to the center of the car; that in preparing to alight at Cicero Avenue, he left the seat and proceeded to the front platform when the car was about in the middle of the block before Cicero Avenue; that there was a lady ahead of him on the front platform; that the car came to a stop at Cicero Avenue; that there was nothing unusual about the stop; that there was no jerky motion "or anything like that, about the car especially"; that when the car stopped the motorman opened the door and the lady who was in front of him started to alight from the car; that as she stepped off the platform on to the step she slipped and lighted on the street; that the streetcar was standing still when she was alighting; that she was in a sitting position in the street when she fell; that the witness got off the streetcar and started to help her up; that she told him to let her sit a while; that the conductor and witness helped her to her

feet; that the conductor took her by the arm and proceeded toward the doctor's office; that she walked; and that at that time witness left to get a car northbound on Cicero Avenue.

Irwin Waidanz, the conductor, testified that when the streetcar reached Cicero Avenue it came to a stop; that it was a regular stop; that there was no jerking motion in the stop; that he looked out to see if any passengers were getting on; that nobody was getting on; that he gave the motorman the bell; that the car did not start; that he looked out and saw the motorman and another man helping a woman up at the front platform; that witness went up there; that the motorman said the lady wanted to go to a doctor; that witness walked with the lady to a doctor's office; that witness helped her with his left arm under her right arm; that the supervisor was right in back of the witness when he took the lady to the doctor; and that witness left the lady with the supervisor and the doctor and went back to his car. William Fahey testified that he was a supervisor for defendant, stationed at Cicero Avenue and Roosevelt Road; that his duty was to check cars to see if they arrive at a certain time; that on July 3, 1947, at about 9:30 or a quarter to ten in the morning, he saw a lady have an accident; that he was at the northeast corner at the sidewalk; that he saw a westbound Roosevelt Road streetcar come up and make a regular stop; that there was no jerking motion or any quick stop; that it was nothing unusual; that he saw a woman step from the platform down to the step and on to the street and fall in a sitting position; that a man passenger went to help her

up and the motorman got off; that between the two of them, they helped her up before the witness got there; that the conductor and lady walked to a doctor's office; that witness followed them to the doctor's office; that the car did not stop 50 or 60 feet east of Cicero Avenue before it came to the corner; that when the car was approaching, the front door from the platform to the street was closed and was not opened until the car stopped.

Edward Moravec, the motorman, testified that he had to use the brakes to stop the car in the regular manner; that the door was closed at the time he made this stop; that when he made the stop he opened the door, one lady alighted and ran for a northbound Cicero Avenue car; that the second lady alighted, stepped from the step and fell in a sitting position with her right foot under her; that the car was standing still as she was stepping off; that she stepped from the platform to the step and from the step to the street and then fell in a sitting position; that a passenger and the witness alighted and helped the lady to her feet; that she said she was hurt and wanted to go to a doctor; that the conductor took the lady by the right arm and walked her to the doctor's office and the supervisor followed them; that witness did not open the door 50, 70 or 75 feet or thereabouts east of Cicero Avenue; that the door was not open; and that this lady was not thrown out from the platform onto the street by reason of a jerking of the car when the witness made it stop. On cross-examination, witness said that when they arrived at Cicero Avenue, there were three people on the front platform

waiting to get off; that the lady who got off first ran for a northbound Cicero Avenue car; that the second lady alighted "and went down"; that witness was watching the lady who alighted from the car; that she stepped from the platform to the step and then from the step to the street; that she reached the street with both feet; that she did not fall before she got to the street; that he would not know if she took a step away from the car before she fell; that she did not slip on the step between the platform and the street that witness knew of and her leg did not go out from under her as she was going down from the platform to the street; that the lady fell after both feet were on the pavement; that her back was about a foot from the step of the streetcar; and that she was in a sitting position with her right leg folded under her. There was further testimony as to the facts relative to the question of damages.

Plaintiff bases her case on the theory that when the streetcar was 50 or 60 feet from the stopping place at Cicero Avenue, the motorman opened the door and applied the brakes, that while she was holding the bar with her left hand the car shook, swayed and lurched, causing her to be thrown off the platform and on to the pavement in a sitting position. She did not know exactly how many feet east of Cicero Avenue she was thrown from the car, but the car stopped about 20 or 30 feet east of the building line of Cicero Avenue. Plaintiff was not corroborated by any occurrence witness and there are no probabilities shown by the record which support her version rather than the version of the other witnesses. She

testified that she remained in a sitting position until a man who was on the front platform got off and attempted to help her up. This man, Carl Ahlgren, contradicted plaintiff as to the manner in which the accident happened. The motorman also flatly contradicted her as to the manner in which the mishap occurred. He is corroborated by Ahlgren, the passenger, on the material facts. William Fahey, the supervisor, was at the sidewalk at the northeast corner of the intersection, checking the cars as they arrived, and was in a position to see, and according to his testimony did see the mishap. He also flatly contradicted plaintiff as to the manner of the occurrence and corroborated the witness Ahlgren. The conductor was not in a position to see the occurrence, but was in a position to feel and know whether there was any jerking of the car. He testified that it was a regular stop and that there was no jerking motion in the stop.

Plaintiff points out and we agree that there is a marked conflict in the testimony introduced by the respective parties. She states that defendant introduced the testimony of only one "so-called disinterested witness" and that "three of the defendant's occurrence witnesses were old time employees of the company who can easily be said to have had as great an interest in the outcome of the litigation as the plaintiff herself." Plaintiff also points out that Mr. Ahlgren testified that he boarded the streetcar at Roosevelt Road and Michigan Avenue at 9:00 a.m., whereas the conductor testified that the car was coming from downtown, and that when it came from downtown it did not pass Roosevelt Road and Michigan

Avenue. Plaintiff also states that the motorman admitted that he had changed his story between the time of his deposition taken in January, 1949, when he stated that he had made three runs prior to the accident and that they were coming from downtown when the accident happened, to the version he gave on the witness stand, that he had made only two runs prior to the accident and was coming from the Field Museum. Plaintiff asserts that a further conflict in the testimony developed when the motorman said that there were two women standing on the front platform at Cicero Avenue and that it was the second woman waiting to alight who was injured, whereas Fahey, the supervisor, testified that plaintiff was the only woman who got off the front platform, and Ahgren also said that plaintiff was the only woman who got off the car. Plaintiff further calls attention to the fact that Ahlgren testified that the woman fell in a sitting position facing southwest, about 2½ feet away from the car, and that the motorman said she fell in a sitting position with her back up against the car facing to the northwest. Plaintiff asserts further that taking all of these discrepancies into consideration it becomes obvious that these witnesses only served to impeach each other as to material events; that these discrepancies were so great as to create a true question of fact for determination by the jury; that it was for the jury to decide, by considering all of the evidence, the apparent contradictions that existed and weigh these contradictions against the facts developed by plaintiff's testimony and then arrive at a verdict; and that the fact that plaintiff's testimony was uncorroborated is not significant of itself.

While it is possible that a motorman might open the door when the car is 50 or 60 feet from the stopping place and apply the brakes so as to cause the car to shake, sway and lurch to such an extent as to throw a passenger off the car, it cannot reasonably be said that such is a probability. A possibility is an uncertain thing which might happen while a probability is a likelihood. (Black's Law Dictionary.) In Peasley v. Glass, 61 Ill. 94, decided when the Supreme Court passed upon the weight of the evidence, the court said (95):

"We are obliged to say that this verdict is plainly against the weight of the evidence. There are very few cases in which a jury should find a verdict for the plaintiff upon his unsupported testimony alone, when that testimony is positively contradicted by the defendant. It belongs to the plaintiff to make out a case. The burden of proof is upon him, and where the issue rests upon the sworn affirmation of one party and the sworn denial of the other, both having the same means of information and both unimpeached, and testifying to a state of facts equally probable, a conscientious jury can only say that the plaintiff has failed to establish his claim. Without saying that this court would set aside a verdict for the plaintiff, rendered in such cases, on the ground alone that it was not sustained by the evidence, we must set aside one resting only upon the evidence of the plaintiff when that is contradicted not only by the defendant but also by another witness, and there are no elements of probability to turn the scale. Such is the present case."

In Dick v. Swenson, 137 Ill. App. 68, the court said (74):

"When the verdict rests solely on the uncorroborated testimony of the plaintiff, contradicted by that of the defendant, whose testimony is corroborated by other witnesses, it cannot be sustained."

See Huchette v. Williamson County Coal Co., 188 Ill. App. 321; Williamson v. Hirsh, Stein & Co., 147 Ill. App. 500; Standidge v. Lynde, 120 Ill. App. 418; McFadden v. Chicago, Rock Island & Pacific Ry. Co., 149 Ill. App. 298; Donahue v. Frank E. Scott Transfer Co., 141 Ill. App. 174; Manzello v. Chicago City Ry. Co., 207 Ill. App. 15, (abst.)

While the motorman might have had an interest in avoiding personal blame for the accident, the conductor and the supervisor were not and could not be charged with any blame. The employees were corroborated on the controlling facts by a total stranger to the parties. Plaintiff admits that this man was present and assisted her. There was some conflict in the testimony of defendant's witnesses. All of the witnesses called by defendant testified that the streetcar was standing still when plaintiff fell. This is the controlling fact of the case. These witnesses are criticised by plaintiff because they differed on some of the other details. In Starkie on Evidence, Tenth Edition, it is said:

"It is here to be observed, that partial variances in the testimony of different witnesses, on minute and collateral points, although they frequently afford the adverse advocate a topic for copious observation, are of little importance unless they be of too prominent and striking a nature to be ascribed to mere inadvertence, inattention, or defect of memory. It has been well remarked by a great observer, that the 'usual character of human testimony is substantial truth under circumstantial variety.' It so rarely happens that witnesses of the same transaction perfectly and entirely agree in all points connected with it, that an entire and complete coincidence in every particular, so far from strengthening their credit, not infrequently engenders the suspicion of practice and concert."

In Holland v. Chicago Transit Authority, 337 Ill. App. 100, (abst.) we quoted the following from Chicago City Railway Co. v. Mead, 206 Ill. 174, 181:

"Section 61 of the Practice Act provides that exceptions taken to the decision of the court overruling a motion for a new trial shall be allowed, and the party excepting may assign for error any decision so excepted to. The duty of considering and deciding upon any error so assigned is entrusted to the Appellate Court. Those courts

are a part of the judicial system of the State equally with the jury and the trial judge, and must discharge their duty, not according to the judgment of others, but according to their own judgment. The law commits to the sound judgment of the Appellate Court the question whether the trial court erred in overruling a motion for a new trial on the ground that the verdict is against the weight of the evidence. At the common law the trial of an issue of fact was by judge and jury, the judge stating to the jury the issues and what evidence had been given in support of them, and summing up the whole case. Section 51 of the Practice Act provides that the court shall only instruct as to the law of the case; but trial by jury does not imply a trial without a judge having a supervisory power over the verdict, or without a court of review guided and controlled by its own conscience and judgment in passing upon questions committed to it by the law. If a verdict and judgment are clearly against the weight of the evidence, a new trial should be awarded by the Appellate Court and the issues submitted to another jury."

From a reading of the transcript of the evidence we are convinced that the verdict is against the manifest weight of the evidence.

There is merit in defendant's objection to plaintiff's given instruction No. 4. On a retrial of the case the instruction should be modified to meet these objections. On a retrial the complaint should also be amended to meet the further objections to plaintiff's given instructions Nos. 4 and 20. Defendant also insists that the damages awarded are excessive. It is unnecessary to consider that point at this time.

For the reasons stated, the judgment of the Superior Court of Cook County is reversed and the cause is remanded for further proceedings not inconsistent with the views expressed.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

KILEY AND LEWE, J. CONCUR.

45112

NAT D. GOLDBERG, Appellant,	)	APPEAL FROM
v.	)	SUPERIOR COURT
LEON HAMBURGER, MAY HAMBURGER and THE HAMBURGER COMPANY, a corporation, Appellees.	)	COOK COUNTY.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On November 21, 1945, Nat D. Goldberg filed an amended two count complaint at law in the Superior Court of Cook County against Leon Hamburger, May Hamburger, his wife, and The Hamburger Company, a corporation. to recover damages for a breach of contract. May Hamburger died on December 30, 1947, and Leon Hamburger, as executor of her estate, was substituted. On April 18, 1949, by leave of court, Count III of the amended complaint was filed. On September 29, 1949, on motion of plaintiff the action was dismissed as to Leon Hamburger as executor of the estate of May Hamburger. In the answer defendants denied substantially all of the allegations of the amended complaint. At the close of plaintiff's case the court directed a verdict for the defendants and denied the motion for a new trial. Judgment was entered on the verdict, to reverse which plaintiff appeals.

Count I alleges:

"1. That The Hamburger Company is a corporation

duly organized and existing under and by virtue of the laws of the State of Illinois, engaged in the conduct of its business in the City of Chicago, in said County and State; that Leon Hamburger was, during the happening of all the events hereinafter set forth, the president of said corporation and he and May Hamburger were the owners of all the shares of the capital thereof."

"2. That on or about November 28, 1944, said Leon Hamburger and May Hamburger agreed to sell to plaintiff and plaintiff agreed to buy, all of said shares of said capital of The Hamburger Company at a price equal to the value of the stock of unfinished goods of said corporation fixed at legal costs or O P A ceiling prices, whichever was the higher; plus the value of finished goods valued at cost; from all of which the account of said Leon Hamburger with said corporation and moneys owed by said corporation were to be deducted."

"3. That relying on said agreement plaintiff, who was then and there the owner of certain shares of the capital of Sunset, Inc., a corporation organized and existing under and by virtue of the laws of the State of Illinois, sold said shares at less than their actual value, in order to acquire the money necessary to pay for said shares in The Hamburger Company."

"4. That on or about December 15, 1944, plaintiff offered to pay for said shares of the capital of The Hamburger Company to said Leon Hamburger and May Hamburger at the price agreed upon as aforesaid; that said Leon Hamburger then and there represented to plaintiff that in order not to interfere with the December, 1944 production and sales by making an audit at that time, an audit would be made to determine precise price at the close of the year 1944, at which time plaintiff could pay said price for said shares of capital; that said Leon Hamburger further, then and there, represented to plaintiff that he could consider the deal closed and requested plaintiff to enter upon the conduct of the business of said The Hamburger Company and take part therein, and render services in that behalf in the same manner as if the purchase price had been paid and plaintiff were the owner of said shares of the said business."

"5. That plaintiff complied with said request and on December 18, 1944, did enter upon the conduct of said business and did render such services daily thence until February 24, 1945; that on February 24, 1945, said Leon Hamburger and May Hamburger notified plaintiff that they would not sell said shares or any of them to plaintiff, and have at all times since refused to sell or transfer said shares, notwithstanding that plaintiff has always been ready and willing and offered to purchase the same."

"6. That by reason of the aforesaid The Hamburger Company received, accepted and retained benefits by reason of the services so performed by plaintiff as follows: (a) Sale to McKesson & Robbins 27,000 cases of cordials at a profit of $5.00 per case, a total benefit of $135,000 to said defendant. (b) Installation of a production system which increased the production from an average of 125 cases of fifths per day to 175 cases of pints and half-pints; that this increased the profits for said defendant during the period that plaintiff rendered services as aforesaid in the sum of $12,375, the benefit of which was received by said defendant. (c) By means of plaintiff's services, plaintiff obtained for said defendant certain labels for which, prior thereto, said defendant paid $4.80 to $6.40 per 1000, for $2.50 to $3.00 per 1000, and thereby said defendant received and retained benefits of $665.60. (d) During said period of time that plaintiff performed services as aforesaid, he solicited business, contacted and acquired customers and built up an additional profitable business for said defendant, who received the benefit thereof; that the reasonable compensation therefor to which plaintiff is entitled is $10,000. (e) By means of plaintiff's services, plaintiff obtained for said defendant 20,000 gallons of fruit spirits at a cost of 58 cents per gallon less than said defendant was paying, whereby defendant was benefited in the sum of $11,600. (f) That in pursuit of the aforesaid premises plaintiff expended for legal and accountant's fees and other miscellaneous matters the sum of $2,850. Wherefore, plaintiff prays judgment for the sum of $175,000."

Count II, after realleging the allegations of Count I, avers:

"2. That at the special instance and request of the defendants, Leon Hamburger and May Hamburger, plaintiff did and bestowed certain work and services in and about the business of the defendant, The Hamburger Company, during the period beginning December 18, 1944, and ending February, 1945, for which said Leon Hamburger and May Hamburger agreed to pay plaintiff, when requested, what the said services were reasonably worth."

"3. That such services consisted of a sale to McKesson & Robbins of 27,000 cases of cordials; installation of a production system; purchase of labels and fruit syrups; solicitation and acquisition of new customers and business; that in the performance of such services and in connection therewith plaintiff expended $2500."

"4. That said services were reasonably worth $50,000; that plaintiff requested said defendants to pay said sum therefor; that the same has not been paid nor any part thereof. Wherefore, plaintiff demands judgment against said defendants for the sum of $50,000."

Count III realleges paragraphs 1, 2, 3 and 4 of Count I and avers:

"2. That the defendant Leon Hamburger, at the time of the inception of the negotiations aforesaid, in consideration of plaintiff's undertaking to render the services aforesaid, and in particular plaintiff's undertaking to sell McKesson and Robbins the cordials manufactured by The Hamburger Company, promised and agreed that in the event the proposed sale of shares of capital stock of The Hamburger Company to the plaintiff was not consummated, that said defendant Leon Hamburger would pay or cause to be paid to plaintiff the profits derived by The Hamburger Company on all its sales and contracts to sell cordials to said McKesson and Robbins."

"3. Plaintiff realleges paragraph 5 of Count I as if fully set forth herein."

"4. That as a result of plaintiff's services rendered as aforesaid The Hamburger Company sold and contracted to sell its cordials to McKesson and Robbins and derived from such sales and contract to sell the sum of to-wit: $135,000; and by reason of the failure and refusal of said Leon Hamburger and May Hamburger to consummate the sale of said shares of capital stock of The Hamburger Company to plaintiff, defendant Leon Hamburger became and is obligated to pay plaintiff the said sum of to-wit: $135,000, but he has refused so to do. Wherefore plaintiff prays judgment against Leon Hamburger for the sum of $135,000."

Plaintiff contends that the judgment is erroneous because "there was at least one cause of action against the defendants proven by the evidence on behalf of plaintiff." Plaintiff, however, does not point out which of the three purported causes of action has been proven or against which defendant. Defendants assert that if Count I states any cause of action it is one against the corporation for the value of the services alleged to have been performed for its benefit, and that Count II is against Leon Hamburger and May Hamburger and alleges, in substance, that at their special instance and request plaintiff

performed certain work and services in and about the business of the corporation for which the Hamburgers agreed to pay him, when requested, what the services were reasonably worth. Plaintiff, in his reply brief, maintains that Counts I and II are founded on the doctrine of "unjust enrichment." We agree with defendants that Counts I and II are founded upon quantum meruit and that plaintiff introduced no evidence whatsoever as to what the alleged services or any of them were reasonably worth. A plaintiff may not recover upon quantum meruit without some proof of the value of the alleged services for which such recovery is sought. McNally v. Regan, 185 Ill. App. 424, (abst.); Schillinger Bros. v. Thompson-Starrett Co., 171 Ill. App. 319; Johnson v. Peterson, 166 Ill. App. 404. Plaintiff rejoins that it was not necessary for him to prove the reasonable value of the services, but that he did prove the profit "by which the defendants enriched themselves and gained by taking advantage of the plaintiff." We are of the opinion that the doctrine of "unjust enrichment" was neither pleaded nor proved.

In Count III plaintiff alleged an agreement purporting to bind Leon Hamburger personally. The only conclusion that reasonably may be drawn from the evidence is that Leon Hamburger, as president of the corporation, promised the plaintiff that if the deal to purchase stock fell through, the corporation would pay to plaintiff any profits realized by it on the McKesson & Robbins business,

and that he (Leon Hamburger) personally guaranteed that the corporation would make such payment. Such evidence does not tend to establish any direct or individual promise of Leon Hamburger as alleged in Count III.

There is no evidence of any express authority on the part of Leon Hamburger to make an agreement on behalf of the corporation to pay any profits accruing to it on business procured from McKesson & Robbins by plaintiff. As president, Leon Hamburger would be presumed to have authority to execute such ordinary contracts as are required in every day business of the corporation. It is well settled that a president of a corporation has no implied authority to make a contract on its behalf which is unusual or extraordinary. A contract that the corporation would pay to the plaintiff any profit accruing to it on business procured from McKesson & Robbins by plaintiff as an incident to a proposed stock sale by the president's wife, is unusual and extraordinary, and falls within the rule discussed in Sacks v. Helene Curtis Industries, 340 Ill. App. 76, (Leave to appeal denied). In deciding whether the court should have directed a verdict, we are aware of the well recognized rule that we have no right to pass upon the credibility of the witnesses, to consider any purported impeachments, the weight thereof, or the weight of the testimony, since the motion admits the evidence in favor of plaintiff to be true, together with all legitimate inferences. We are satisfied that the trial court was right in directing a verdict. Therefore, the judgment of the Superior Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

KILEY AND LEWE, JJ. CONCUR.

45174

EMIL TABBERT and FERDINAND TABBERT, Appellants, v. ROBERT W. GUERINE, Executor of Estate of Matilda Tabbert, and FLORENCE HAESKE, Appellees.	)	APPEAL FROM SUPERIOR COURT COOK COUNTY.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Fred Tabbert and Matilda Tabbert, his wife, of Melrose Park, Illinois, were the owners in joint tenancy of a parcel of real estate located in that village. Each of them had previously been married. On November 20, 1944, Fred Tabbert died, leaving as his survivors Matilda Tabbert, his widow, and Emil Tabbert and Ferdinand Tabbert, his sons by a previous marriage. On the death of Fred Tabbert the real estate became the sole property of Matilda Tabbert, his widow, the surviving tenant. On February 2, 1946, the widow conveyed the real estate to Ferdinand Tabbert and Marie Tabbert, his wife, in consideration of the agreement of Ferdinand Tabbert "to take care of and support" Matilda Tabbert for the remainder of her life. Subsequently, Ferdinand and Marie Tabbert reconveyed the realty to Matilda Tabbert. On February 2, 1948, Matilda Tabbert departed this life, leaving a last will and testament which was admitted to probate on May 14, 1948. On January 28, 1944, Fred E. Tabbert made a will wherein he devised all of his property to his wife, Matilda Tabbert "as long as she shall live, with full power and authority to sell and convey any

and all of the property she may need for her proper support." In the will(disclosed after the death of his wife) he bequeathed $300 to his son Ferdinand, $5 to his daughter Olga Tabbert Wolf, and the rest, residue and remainder to his sons Ferdinand Tabbert and Emil Tabbert, share and share alike. He nominated Ferdinand Tabbert to be the executor of the will. The will was admitted to probate on October 31, 1949. The record is silent as to whether Olga Wolf survived her father.

On November 10, 1949, Emil Tabbert and Ferdinand Tabbert filed an amended complaint "In The Nature of Interpleader" in the Superior Court of Cook County against Robert W. Guerine, Executor of the Estate of Matilda Tabbert, and Florence Haeske, praying that defendants be required to account for all of the property which came into defendants' possession, including cash, stocks, bonds, insurance, real estate and the income therefrom; that defendants be required to release to plaintiffs all of their right, title and interest in and to the property, that defendants be required to deliver to plaintiffs all of the property which belonged to Fred Tabbert and Matilda Tabbert and the income therefrom; and that they have such other and further relief in the premises as shall appear to be just and equitable. Plaintiffs represented that at the time their father, Fred Tabbert, made his will, (January 28, 1944) Matilda Tabbert, his wife, "orally agreed to the execution and terms thereof"; that the will was not discovered "until very recently"; that Fred E. Tabbert died possessed of the realty in Melrose Park and

personal property of the value of $5,000; that on his death his widow took possession of the realty and personal property; that she retained possession of the personal property until on or about April 3, 1947; that on February 2, 1946, she conveyed the realty to Ferdinand Tabbert in consideration that he would take care of and support her for the remainder of her life; that the deed was duly recorded; that Ferdinand cared for and supported Matilda, his stepmother, from February 2, 1946 to on or about April 3, 1947; and that he has at all times been ready and willing to perform his agreement "up to the day of her death." Plaintiff further represented that on or about November 15, 1946, Florence Haeske, a neighbor of Matilda, "while acting in a fiduciary capacity, used her influence upon the said Matilda Tabbert by making false representations to the said Matilda to the effect that Ferdinand Tabbert was cheating and defrauding her out of her property and would not support her as he agreed to do"; that at the time the statements were made Florence Haeske knew they were false and untrue; that Florence Haeske used her influence upon Matilda by making fraudulent misrepresentations to her regarding Ferdinand Tabbert for the purpose of cheating and defrauding the plaintiffs out of their rights in and "to the aforesaid property"; that on March 13, 1947, she caused Matilda Tabbert to execute her last will and testament whereby Matilda, "with the exception of $600 legacies," devised and bequeathed the remainder of her property to Florence Haeske; that at the time the will was executed Matilda was mentally incompetent; that she did

not realize the "full effects of her acts"; that Florence Haeske knew at the time that Matilda was incompetent; that the "act" of Florence Haeske, "through her influence and misrepresentations for the purpose of defrauding plaintiffs out of their parts," was responsible for the execution of the will by Matilda; that on March 29, 1947, Florence Haeske filed a petition in the Probate Court to have Matilda Tabbert declared incompetent and "designating" that she be appointed conservator therein; that on or about that date Matilda was examined; that on April 3, 1947, she was found to be incompetent and "committed to the State Hospital at Dunning"; that Florence Haeske was appointed conservator and took charge of the property of Matilda Tabbert; that Matilda died on February 2, 1948; that Florence Haeske filed an instrument purporting to be the last will of Matilda Tabbert in the Probate Court; that the will was admitted to probate on May 14, 1948; that Robert W. Guerine was appointed executor; that at the time Matilda was declared incompetent she had on deposit in the Melrose Park National Bank, $3,028.87; that during the period from February 15, 1947, until the death of Matilda, she was physicially and mentally incompetent to care for and manage her own affairs; that Florence Haeske appropriated to her own use all of the property of Matilda "which lawfully belonged to plaintiffs"; that while Florence Haeske was acting in a confidential and fiduciary capacity toward Matilda, she used and exercised "many undue arts and fraudulent practices, and resorted to falsehoods and misrepresentations to obtain possession and control over the

property" belonging to Matilda and plaintiffs; that all of the property came into the possession of Florence Haeske "without consideration" during the time a fiduciary relationship existed between her and Matilda; that Matilda has no legal right or title to the property, but was holding the property as constructive trustee for plaintiffs; that since Robert W. Guerine was appointed executor he has had in his possession and control all the properties, personal and real; that he now threatens to file his final account and to surrender all the properties remaining in the estate to Florence Haeske as residuary legatee; and that defendants be enjoined from prosecuting "the suit now pending in the Probate Court" until "this suit or any other suit filed by plaintiffs be fully terminated."

Defendants filed a motion to strike the amended complaint and to dismiss the cause of action under Section 48 of the Civil Practice Act, supporting their motion by affidavits and documents. Plaintiffs filed an answer to the motion. The chancellor sustained defendants' motion and dismissed the amended complaint for want of equity. Plaintiffs appeal.

The affidavits and documents considered by the court show that on December 16, 1949, Ferdinand Tabbert, one of the plaintiffs, filed a complaint in chancery in the Circuit Court of Cook County against the defendants, praying that the court decree that they deliver to plaintiff "the monies and property or the reasonable value thereof" belonging to plaintiff, and that they have such other and further

relief as to the court might seem proper. The allegations in the complaint then filed and the relief sought are substantially the same as the allegations and the prayer in the instant suit. In the Circuit Court suit defendant filed a motion to strike and dismiss. On April 8, 1949, the chancellor in the Circuit Court, upon stipulation of the parties by their respective attorneys, the court being fully advised in the premises, ordered that the cause be dismissed for want of equity. On June 3, 1949, Ferdinand Tabbert filed a petition in the Circuit Court case in which he represented that at the time the stipulation to dismiss was filed "he was not fully informed as to his rights"; that thereby he was deprived of his right, title and interest in and to the real estate and the $3,028.87; that the real estate has a value of $15,000; and that Florence Haeske "paid no consideration for the interest she claims to have" in the real estate or in the $3,028.87. He asked that the stipulation be declared null and void and that the order dismissing the cause be vacated; that defendants be required to answer the complaint; and that he have such relief as to the court might seem just. Defendants, answering, set out that at the time the stipulation was filed Ferdinand Tabbert was represented by an attorney; that negotiations for a settlement extended over a period of weeks; that $350 was paid to plaintiff in settlement; that he executed a release; that the real estate was owned in joint tenancy by Fred and Matilda Tabbert; that upon Fred's death it became the sole property of Matilda Tabbert; that she executed a quit claim deed conveying the

real estate to plaintiff and his wife; that subsequently a suit was filed by Matilda Tabbert in the Circuit Court, wherein she prayed that the conveyance to Ferdinand and Marie Tabbert be set aside; that a settlement was arrived at; that Ferdinand and Marie Tabbert quitclaimed all of their interest and title to Matilda Tabbert in consideration of the payment by Matilda Tabbert of $200; that Matilda Tabbert died on February 2, 1948, leaving a last will and testament which was admitted to probate on May 14, 1948; that no complaint to set aside or contest the will by any of the heirs, legatees or devisees was filed within the time prescribed by law; that prior to the payment of the $350 by the executor of the estate of Matilda Tabbert, deceased, to plaintiff therein, a petition was filed by the executor in the Probate Court praying for leave to pay Ferdinand Tabbert $350; that on April 8, 1949, the Probate Court entered an order giving the executor leave to settle the Circuit Court case for $350; that the $350 was paid to Ferdinand Tabbert in full settlement; and that on May 26, 1949, Ferdinand Tabbert filed a petition in the Probate Court of Cook County in the matter of the estate of Matilda Tabbert, deceased, seeking "the same relief" as he asked in the Circuit Court case.

Attached to the answer was a copy of the complete release dated April 7, 1949, signed by Ferdinand Tabbert. Also attached to the answer was a copy of a petition to the Probate Court and a copy of an order allowing Robert Guerine, executor of the estate of Matilda Tabbert, to pay an attorney $405 for his fees and costs in the Circuit Court case, and

allowing him to pay Ferdinand Tabbert $350 in settlement of the litigation of the Circuit Court case. Also attached to the answer is a copy of a petition by Ferdinand Tabbert "to vacate the order admitting the will of Matilda Tabbert to probate and for other relief" filed in the Probate Court in the matter of the estate of Matilda Tabbert, deceased, on May 20, 1949. The petition contains substantially the same allegations as the complaint in the instant case. Therein Ferdinand Tabbert prayed that the Probate Court vacate the order admitting "the instrument purporting to be the last will and testament of Matilda Tabbert to probate"; that Florence Haeske and Robert Guerine file a complete report of all the personal property that came into their possession; that in the event the Probate Court was of the opinion that the order admitting the will of Matilda Tabbert to probate should not be vacated, that the "fifth paragraph of said will be denied for the reason that any property or interest therein taken by the said Florence Haeske thereunder is void, without consideration, and was obtained through fraud, duress, misrepresentation and undue influence used upon the said Matilda Tabbert by the said Florence Haeske for her own gain." Also attached to the answer was a copy of a petition by Emil Tabbert that he be granted leave to join Ferdinand Tabbert in the petition then pending; also a copy of an order entered by the Probate Court on May 27, 1949, reciting that on motion of Ferdinand Tabbert and Emil Tabbert for leave to file a petition to vacate the order admitting the will of Matilda Tabbert to probate and for other relief, that the motion to

file the petition be denied. Also attached to the answer was a copy of an inventory filed by the executor in the matter of the estate of Matilda Tabbert, deceased. The inventory, approved by the probate judge on June 11, 1948, shows cash of $2,687.43 on deposit, the real estate hereinbefore mentioned and a few articles of household furniture.

Attached to the answer is a copy of a petition to discover assets filed by Ferdinand Tabbert, as executor of the estate of Fred Tabbert, deceased. Therein he stated that Robert Guerine and Florence Haeske "have in their possession and control moneys, chattels and other property belonging to the estate of Fred Tabbert, deceased," which they refuse to deliver to petitioner, and asked that Robert Guerine and Florence Haeske be summoned to appear and submit to examination under oath pertaining to the properties, and to show cause why an order should not be entered requiring each of them to deliver up to the petitioner any and all properties that they now have in their possession and control belonging to the estate of Fred Tabbert, deceased. A citation to discover assets and commanding Robert Guerine and Florence Haeske to appear for examination and to show cause was issued in the matter of the estate of Fred Tabbert, deceased, on November 28, 1949. Thereafter, the respondents, Robert Guerine and Florence Haeske, filed a motion to quash the citation and to dismiss the petition to discover assets. The motions set up the various proceedings theretofore had. On January 11, 1950, the court ordered that the citation be quashed and that the petition for the citation be dismissed.

Plaintiffs disclaim any intention of attacking the will of Matilda Tabbert, deceased. They have no interest in her estate. They are not her heirs and they are not mentioned in her will. However, in all of the actions plaintiffs or one of them allege that the will of Matilda Tabbert was induced to be made because of fraud and undue influence exerted by Florence Haeske. It is obvious, (and plaintiffs now admit) that they have no right to attack the will of Matilda Tabbert. The complaint in the instant case does not contain sufficient factual allegations to show that frqud was practiced on plaintiffs. From a reading of the record it appears that Ferdinand Tabbert and his wife, Marie Tabbert, reconveyed to Matilda Tabbert of their own free will. They were represented by counsel. The order entered in the Circuit Court finally disposed of the case on the merits. Although a motion was made to vacate that order, there is nothing in the record before us to show what action if any was taken on the motion. It is essential that the facts and circumstances which constitute fraud and deceit be set out clearly and concisely and with sufficient particularity to apprise the opposite party of what he is called upon to answer. Bouxsein v. First National Bank of Granville, 292 Ill. 500. In order to constitute fraud in law, a representation must be an affirmance of fact and not a mere promise or expression of opinion or intention. We find that the dismissal of the complaint for want of equity in the Circuit Court case is res judicata as against Ferdinand Tabbert as to all matters set out and relief

claimed in the case at bar. We also find that the release signed by him is a complete bar to his action. Plaintiffs maintain that where a release is signed for a grossly inadequate consideration it amounts in itself to a fraud on the part of defendants and forms a basis for equitable relief. In our opinion Ferdinand Tabbert did not set up any case for equitable relief in the Circuit Court. Payment to him of $350 was not inadequate consideration for his agreement to dismiss the complaint.

It will be observed that plaintiffs sought to have the Probate Court vacate the order admitting the will of Matilda Tabbert to probate and for other relief. The Probate Court ruled against plaintiffs. They did not appeal. Where the Probate Court has jurisdiction of the subject matter and of the parties, the same presumption in favor of the rulings of that court must be indulged as of the Circuit Court under like circumstances. Skidmore v. Johnson, 334 Ill. App. 347 364. We are satisfied that the order of the Probate Court denying plaintiffs' petition is res judicata as to the issues in the instant case.

On the death of Fred Tabbert the real estate became the property of Matilda Tabbert. She conveyed it to Ferdinand Tabbert and his wife, who reconveyed it to her. We have held that in these transactions there was no fraud. As to the personal property, we call attention to the fact that Ferdinand Tabbert filed his petition for a citation to discover assets in the estate of Fred Tabbert and that a

citation issued commanding that defendants appear and be examined under oath. The purpose of this citation was to discover assets of the estate of Fred Tabbert and to have such assets delivered to the executor of that estate for distribution in accordance with the will of decedent. The court dismissed the petition. Ferdinand Tabbert did not appeal from this order. The order quashing the citation and dismissing the petition was res judicata. The amended complaint filed by plaintiffs in the instant case is devoid of allegations entitling them to any relief. The documents attached to the motion to dismiss the complaint support the action of the chancellor in so doing. Therefore, the decree of the Superior Court of Cook County is affirmed.

DECREE AFFIRMED.

KILEY AND LEWE, JJ. CONCUR.

44926

ADELE ULLMER, et al., Plaintiffs, v. ROOSEVELT BUILDING CORPORATION and PETER J. VLAHOS, Defendants, NICHOLAS K. DRANIAS and NICK PALMER, Intervening Petitioners, Petitioners - Appellees, v. ROOSEVELT BUILDING CORPORATION and PETER J. VLAHOS, Respondents. On Appeal of PETER J. VLAHOS, Respondent - Appellant.	APPEAL FROM SUPERIOR COURT COOK COUNTY.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

April 28, 1942 plaintiffs filed a complaint against defendants Roosevelt Building Corporation and Peter J. Vlahos, charging waste and mismanagement of the building corporation. October 9, 1942 Nicholas K. Dranias and Nick Palmer, owners of certain stock in the building corporation, filed an intervening petition, also charging mismanagement of the affairs of the building corporation and praying for an accounting and general relief. Afterwards the complaint was dismissed by stipulation. After the issues were joined on the amended intervening petition the cause was referred to a master in chancery. In conformity with the master's findings and recommendations a decree was entered finding that petitioner Dranias and respondent Vlahos were joint adventurers in the purchase

and operation of the apartment building owned by the building corporation and directing that the cause be referred to a master to take an accounting. Respondent Vlahos appeals.

The facts out of which the controversy arises are substantially as follows. In 1926 Dranias and Vlahos purchased a farm, each contributing one half of the purchase price. Shortly afterward they traded the farm for a dwelling house and an apartment building consisting of fifteen apartments and three stores located in the city of Berwyn, Illinois. Because of their inability to meet the mortgage payments on the dwelling house they sold it and the net proceeds of the sale, amounting to $300 were expended on the apartment building. Title to the apartment building was held by Dranias and Vlahos as tenants in common and encumbered by two mortgages, the first in the sum of $60,000, and a junior encumbrance of $10,000. For a period of three years after acquiring title to the apartment building Dranias collected the rents and managed the building and made monthly accountings to Vlahos of the receipts and expenditures. In 1931 Vlahos took over the management of the building and made regular monthly accountings to Dranias. While Vlahos and Dranias managed the building no profits were made nor were any general taxes or special assessments paid.

In 1933 a bill was filed to foreclose the first mortgage on the premises and a decree of sale was entered in 1936. In 1935 one James Pio, an attorney representing both parties, organized the Roosevelt Building Corporation, an Illinois corporation with an authorized capital stock

of one hundred shares which was later increased to five thousand shares of no par value. Title to the building here involved was conveyed to the building corporation.

April 21, 1938, Dranias and Vlahos entered into a written agreement which reads:

> MEMORANDUM OF AGREEMENT made and entered into this 21st day of April, A. D. 1938, by and between Peter Vlahos and Nick Dranias, both of the City of Chicago, County of Cook and State of Illinois,
>
> WITNESSETH:
>
> WHEREAS, the parties hereto are the owners of all the stock at present issued and outstanding or control same of the Roosevelt Building Corporation, which said corporation is the title holder to certain property located in the City of Berwyn, County of Cook and State of Illinois, and
>
> WHEREAS, the said property has been the subject of foreclosure proceedings in the Circuit Court of Cook County, Illinois, being case No. B-265695, and
>
> WHEREAS, the parties hereto are negotiating with the Trustee of said mortgage, so being foreclosed, and the bondholders interested in said foreclosure proceedings, and are desirous of affecting a re-organization of the indebtedness in the interests of all the parties in and to said property, and
>
> WHEREAS, further the said Nick Dranias is not in a position to advance funds that may be required by the title holders in connection with said re-organization, and
>
> WHEREAS, the said Peter Vlahos has expressed his willingness to advance such funds,
>
> NOW, THEREFORE, it is agreed upon by and between the parties hereto as follows:
>
> 1. Peter Vlahos shall advance all funds that may be required to be advanced by the parties hereto in connection with the proposed re-organization of said property.

2. Peter Vlahos shall have the right in behalf of the parties hereto and it shall be his duty to subscribe for and pay for all the stock that the parties hereto shall be allotted under any proposed re-organization.

3. Peter Vlahos shall at all and any times render to Nick Dranias an accounting of all his acts and doings in the premises upon request and upon completion of the re-organization it shall be his duty upon request to render to the said Nick Dranias a complete statement of the debts and accounts between the parties hereto.

4. Nick Dranias shall pay and has paid at the time of the execution of these presents the sum of Five Hundred ($500.00) Dollars to the said Peter Vlahos for which said sum the said Peter Vlahos shall give no accounting nor any credit upon any payments which might become due under the terms of this agreement.

5. Nick Dranias shall endorse in blank and deposit with the said Peter Vlahos all stock now held or controlled by the said Nick Dranias including all stock which may or might be issued to the said Nick Dranias or controlled by him under the plan of re-organization to be adopted.

6. Nick Dranias shall pay to Peter Vlahos within Six (6) years from this date all indebtedness which may then appear due to the said Peter Vlahos, if any, upon an accounting between the parties hereto to be had at that time covering all dealings between the parties hereto and shall pay interest on all the indebtedness, if any, at the rate of Five (5%) per cent per annum payable each year, provided, however, that if said interest, if any, shall not be paid the same shall be compounded annually until paid.

Upon the liquidation of all the indebtedness between the parties hereto, it shall be the duty of the said Peter Vlahos to surrender and deliver to the said Nick Dranias all stock or securities then held by the said Peter Vlahos for the benefit of said Nick Dranias.

7. At the end of said period of Six (6) years if the said Nick Dranias shall not have paid all the indebtedness then due from said Nick Dranias, if any, to the said Peter Vlahos, then the said Peter Vlahos shall become the absolute owner of all securities deposited with him by said Nick Dranias

and shall pay the said Nick Dranias any sum of money that may have then appeared due to said Nick Dranias upon an accounting then had between the parties hereto and the said Nick Dranias shall pay any indebtedness that may then be due the said Peter Vlahos. For the purpose of arriving at an accounting the parties hereto agree that said property then owned by the corporation shall be valued at the gross sum of Thirty Thousand ($30,000.00) Dollars.

8. If the property, which is the subject of this agreement shall be sold by the corporation before the expiration of the six (6) year period herein fixed, rights between the parties hereto shall be adjusted on the basis of the selling price of said property.

9. All of the covenants herein contained shall be construed together and shall be interdependent, but a violation of one of the covenants hereto shall not constitute a termination of this agreement or a breach thereof if such violation can be otherwise construed.

10. This covenant and all provisions thereof shall inure to the benefit of and be binding upon the parties hereto, their respective heirs, administrators, executors and assigns.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and affixed their seals the day and year first above written.

Peter J. Vlahos (Seal)
Nicholas K. Dranias (Seal)

And on the same day the parties also executed a supplementary agreement which reads as follows:

Supplementary Agreement made and entered into this 21st day of April, A. D. 1938 by and between Peter Vlahos and Nick Dranias both of the City of Chicago, County of Cook and State of Illinois,

WITNESSETH:

Whereas, the parties hereto have this day executed a certain agreement determining the rights and obligations of the parties in connection with the proposed reorganization of the Roosevelt Building Corporation including certain property owned by said corporation.

Now, Therefore, it is agreed upon by and between the parties hereto as and by way of supplement to said contract as follows:

1. The stock in the corporation now held and controlled by the said Nick Dranias and such stock as may be exchanged for said stock, shall be held by the said Peter Vlahos, as Trustee, for the uses and purposes set forth in said original agreement.

2. Said Nick Dranias shall endorse in blank any new certificates issued in exchange for such certificates now held or controlled by him and which have been heretofore delivered to said Peter Vlahos under the terms of said agreement, and in the event said Nick Dranias fails or refuses to so endorse said certificates in blank the said Nick Dranias does hereby make, constitute and appoint the said Peter Vlahos as his true and lawful attorney in fact for the purpose of endorsing such new certificates in blank.

3. In the event any dividends shall be declared on the stock described in paragraph 1 hereof at any time during the life of said original agreement, it is hereby agreed upon by and between the parties hereto that such dividends shall be paid to the said Peter Vlahos and applied by him to a reduction of any indebtedness due to him from said Nick Dranias, such application to be made first on interest upon such indebtedness, if any, and in all other respects the contract referred to and the preamble hereof shall be in full force and effect without any modifications other than herein set forth.

In Witness Whereof, the parties hereto have set their hands and affixed their seals the day and year first above written.

Peter J. Vlahos (Seal)
Nicholas K. Dranias (Seal)

In December 1938 a bondholders' committee had received an aggregate of $41,500 in bonds and approved a plan of re-organization which permitted the building corporation to redeem the premises from the foreclosure sale. This was done. Pursuant to the terms of the agreement Vlahos the principal stockholder of the building corporation was to

clear all liens on the premises, pay expenses of the foreclosure proceedings, and pay and advance the necessary moneys for nondepositing bondholders. In return Vlahos was to receive stock in the building corporation. He purchased the second mortgage bond and acquired $8,400 in face value of defaulted bonds which were delivered to the bondholders' committee. He also advanced $436.09 to pay distributive shares of nondepositing bondholders, and $663.35 for master's fees. Vlahos received 622½ shares of capital stock of the building corporation for clearing the title, 230 shares for moneys advanced to nondepositing bondholders, and 840 shares in exchange for $8,400 of defaulted bonds, making a total of 1692½ shares. After completion of the reorganization the parties met frequently. Vlahos prepared a statement of moneys which he had paid out in connection with the purchase of the bonds, costs of reorganization plans and other expenses.

Respondent Vlahos contends that all conversations and parol agreements between the parties prior to the making of the written contracts are merged in writing. He says that neither of the contracts makes any reference to any stock except that which may be acquired in connection with the reorganization of the apartment building in question, and that there is nothing in the record to show that the parties had acquired on April 21, 1938 (the date of the contracts) all of the bonds which were exchanged for stock at the time of the completion of the reorganization in 1939.

Petitioners argue that the contract is ambiguous and therefore the court is permitted to take into consideration all of the facts and circumstances surrounding the parties at the time it was executed and where the agreement is ambiguous the construction, if reasonable, placed upon it by the parties themselves will be adopted by the court. In support of their position petitioners rely on Pioneer Ins. Co. v. Alliance Ins. Co., 374 Ill. 576 and Chicago Daily News v. Kohler, 360 Ill. 351.

From an examination of the record there is no doubt that up to the time of the making of the agreements of April 21, 1938 Vlahos and Dranias were joint adventurers in the ownership of the premises here in question. As to the conduct of the parties after the making of the agreements there is some conflict in the evidence. The testimony of attorney Pio shows that the attorney's fees were shared equally by the parties and, further, that the bonds were purchased for and in behalf of both parties.

In our view the contract is ambiguous and respondent Vlahos placed a construction on it which required an accounting for stock purchased after its execution. We think the evidence amply supports the master's finding that the parties were joint adventurers from the time they acquired the premises here in controversy and that the same relationship continued after the execution of the agreements on April 21, 1938 as found by the master. We have considered the other points urged and the authorities cited in support thereof but in the view we take of the case we deem it unnecessary to discuss them.

For the reasons given, the decree is affirmed.

DECREE AFFIRMED.

BURKE, P.J. AND KILEY, J. CONCUR.

44939

STATTIN BROTHERS FURNITURE CO., a corporation, Appellant, v. GEORGE F. HAUF and JOSEPHINE L. HAUF, Appellees.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is an action for a declaratory judgment under section 57½ of the Civil Practice Act, Illinois Rev. Stats., chapter 110, paragraph 181.1, State Bar Asso. Ed. 1949, to construe certain deeds granting easements over a switch track. After issues were joined a trial by the court resulted in a finding in favor of defendants and a decree was entered dismissing the complaint for want of equity. Plaintiff appeals.

May 24, 1937 the Pacific Mutual Door Company, a corporation, conveyed to defendants as joint tenants a parcel of land in the City of Chicago bounded on the north by the railroad right-of-way of the Chicago & Alton Railway, on the east by South Rockwell Street, on the south by 37th Street, and on the west by South Washtenaw Avenue.

The Pacific Company also owned a parcel of land lying immediately east of the premises conveyed to defendants. Both parcels of land were served by a switch track located one hundred thirty-five feet south of the railroad right-of-way of the Chicago & Alton Railway. The westerly terminus of the switch track was approximately two hundred

twenty-six feet west of Rockwell Street and extended easterly to where it joined the tracks of the Pennsylvania Railroad. The deed from the Pacific company granted to defendants a perpetual right and easement over the switch track on a strip of land twelve feet in width running from the east line of Rockwell Street to the west line of Maplewood Avenue which is the first street lying east of Rockwell Street.

December 31, 1946 Pacific company conveyed to Carl B. and Eric L. Stattin, copartners, the tract of land approximately ninety-six feet in width located between Rockwell Street and Maplewood Avenue and bounded on the north by the center line of the switch track. This deed granted to the Stattin brothers a perpetual easement over the switch track, and incorporated by reference the easement granted to defendants by the Pacific company. Afterwards the Stattin brothers conveyed all of their interest in the premises to the plaintiff here, Stattin Brothers Furniture Co., a corporation.

October 11, 1948 defendants wrote a letter to plaintiff stating that the only right reserved by the Pacific Company is a right to connect spur tracks with the switch track, and that plaintiff has no right to load or unload cars on the switch track. In its reply to defendants' letter plaintiff stated in substance that it did not intend to use the switch track for loading purpose but that it did intend to use the track for the purpose of unloading cars of lumber which might be shipped to it and which will never exceed approximately four cars a month.

The complaint for declaratory judgment was filed on November 4, 1948, praying, among other things, that the court shall declare that plaintiff shall have a right to use the switch track for the purpose of unloading approximately four cars of lumber each month, in case the court determines that such unloading of lumber would in no practical manner interfere with or obstruct the track so that switching of cars directed to defendants or to occupants of their property by the Pennsylvania Railroad be obstructed or interfered with.

The evidence discloses that plaintiff manufactures parlor frames which are sold to furniture companies and upholsterers; that the factory operating at maximum capacity would require about fifty carloads of lumber a year, and that it takes about six hours to unload a carload of lumber.

Edward L. Johnson, assistant train master of the Pennsylvania Railroad called by plaintiff testified that the Chicago Metal Corporation, which occupies the premises owned by the Haufs on the westerly terminus of the switch track, used the track service once every day except Sundays or holidays, and in some cases it is used twice a day; that east of the plaintiff's property the switch track is used by the Allied Construction Company which deals in ready-mixed concrete, sand, stone and gravel. Both the Allied Construction Company and the Chicago Metal Manufacturing Company have spur tracks.

Johnson further testified that it was not in accordance with the best railroad practice to permit plain-

tiff to unload lumber from the switch track without building a spur, and that it was uncommon "for three industries to use the same track to spot cars and unload from that track," and that there were only two instances in the witness's district "in which common usage is made of a switch track of this type by more than one industry."

Defendant George Hauf testified that they formerly leased the property now owned by them from Pacific company; that they occupied one half of the building and the Pacific company the other half; that "there was always a conflict of loading and unloading cars; we were on the dead end. We came to the point where we either had to move out of the building or purchase it, and we bought the building and they (Pacific) moved out. When we bought the building the question came up about the property across the street which they owned, and we had an option to buy that property, but they agreed to a perpetual easement through this property with the railroad rights without obstruction or interference."

The decree found that the use of the switch track by the plaintiff for the purpose of unloading or spotting approximately four cars of lumber each month would interfere with and obstruct the defendants' use of the switch track within the meaning of the reservation in the deed from the Pacific company, which reads, "that the grantor reserves the right to construct and maintain, at its own expense, one or more <u>spur tracks</u>, located upon its lands adjoining said strip of land, and to have the <u>same</u> connected with said <u>switch track</u> and <u>to operate and use the same</u>, without obstruction of, or interference with, the right and easement above granted

Plaintiff contends that the Pacific company reserved the right to operate and use the switch track so long as this use was without obstruction of or interference with the easement granted to defendants.

In construing an instrument granting easements the court will look to the circumstances attending the transaction, the situation of the parties, the state of the thing granted, and the object to be attained, to ascertain and give effect to the intention of the parties. (Goodwillie Co. v. Commonwealth Co., 241 Ill. 42; Kuecken v. Voltz, 110 Ill. 264.)

Plaintiff argues that the pronoun same appearing in the reservation refers to the next antecedent, switch track, or, possibly, both antecedents, spur track and switch track. In support of its contention plaintiff cites Barnett v. Barnett, 284 Ill. 580, Irvine v. Irvine, 136 Pac. 18, and In re Conner's Estate, 178 Atl. 12.

Defendants say that the construction of the entire document indicates that there has been a reservation by the Pacific company to have a limited use of the switch track for the purpose of reaching its spur tracks where it could spot and unload cars, and that the words spur track and without obstruction or interference show that it was the intent of the parties that Pacific company contemplated the construction of spur tracks to be used in conjunction with the switch track, since there is no reservation for the use of the switch track except in conjunction with the spur tracks.

The testimony of defendant Hauf stands uncontroverted that defendants purchased the premises from Pacific company because of the difficulties arising out of the joint use of the switch track and that they waived the option to purchase the other property upon which the switch track here in controversy is located when they obtained an easement.

From a reading of the record we think the evidence justifies the finding that the contemplated use of the switch track by plaintiff would constitute an obstruction and interference with the use of the switch track as found by the decree.

Taken with the case is defendants' motion to dismiss on the ground that the question presented is moot. During the course of the trial and before the entry of the decree herein plaintiff constructed a spur track for the purpose of spotting and unloading freight cars at its factory. Plaintiff insists that it was compelled to build a spur track for business reasons and because of defendants' contentions in their letter of October 11, 1948, thus reducing the area of its new factory.

The basic question presented here is whether the plaintiff had a right to unload cars on the switch track in the manner alleged in the complaint. In our opinion this question remained in the case even though plaintiff constructed a spur track. The motion to dismiss the appeal is therefore denied.

For the reasons stated, the decree is affirmed.

DECREE AFFIRMED.

BURKE, P.J. AND KILEY, J. CONCUR.

45045

WILLIAM E. McDERMOTT, Appellant,	)	APPEAL FROM
v.	)	CIRCUIT COURT,
JOHN D. MORTON and GERALD J. STEFEK alias JERRY STEFEK, Appellees.	)	COOK COUNTY.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff, a real estate broker, brought an action to recover a broker's commission for the sale of the defendant Stefek's premises on which he operated a restaurant and tavern in the Village of Lincolnwood, Cook County, Illinois. Trial by the court without a jury resulted in a finding and judgment in favor of defendant. Plaintiff appeals.

The complaint alleges in substance that defendant Gerald J. Stefek agreed to pay plaintiff the sum of five thousand dollars for procuring a purchaser of the premises in question; that plaintiff procured the defendant Morton as a purchaser; and that Morton conspired with Stefek to defraud plaintiff by conveying the premises purchased from Stefek to a corporation known as 3546 Devon Avenue Corporation.

In his verified answer filed June 12, 1947 defendant Morton admitted that he was sent by plaintiff to Stefek's place of business, but denies that he purchased Stefek's premises. April 27, 1949 defendant Morton filed a sworn amendment to the answer denying that he was sent by plaintiff to Stefek's place of business on April 10 or at any other time and that he purchased the premises here involved. Stefek filed a general denial.

Plaintiff contends that the overwhelming weight of the evidence shows that plaintiff was retained by Stefek to sell the premises in controversy and that the sale was effected through plaintiff's efforts.

Leroy J. Oram, called by plaintiff, testified that he had known Stefek since World War I; that early in the summer of 1946 he visited Stefek at his place of business, at which time Stefek indicated he would like to sell his tavern; that during the course of this conversation Stefek said, "Bud, go and make yourself some money; maybe you can sell the property"; that the witness told Stefek he was "working out of" plaintiff's office; that they discussed the matter of plaintiff's "handling of the business"; that on two occasions the witness and plaintiff went to Stefek's tavern; that on the first visit they examined the premises and later the witness and plaintiff brought a purchaser who had given plaintiff a certified check for $5,000 as earnest money and that Stefek refused to sell because the buyer was Jewish.

Oram further testified that in April 1947 he told Stefek that plaintiff asked the witness and defendant Morton to see Stefek's books; that the witness told Stefek he was leaving the city to go back into the Government service and "wanted everything to get straight on the Morton deal before I left"; and that Stefek called the witness the night before he left for Akron, Ohio to enter the Government service, and stated he would sell the premises if the buyer would assume payment of the special assessments.

John L. Guswiler, called by plaintiff, testified that he was associated with plaintiff as a licensed real estate salesman; that Stefek's property was advertised "through plaintiff's office at different times"; that he had submitted Stefek's property "to different customers who came into our office"; that in 1946 the witness and plaintiff took one Chaboski to Stefek's premises; and that on other occasions he took two other prospective purchasers to the Stefek property.

Gerald T. Wiley, an attorney, testified that on April 19, 1947, while returning from the trial of a case in the nearby village of Skokie, he visited Stefek's tavern, accompanied by plaintiff; that while plaintiff and Stefek were discussing the sale of Stefek's property to defendant Morton the witness heard Stefek say, "I wonder if those g— d——— Greeks have enough money"; and that plaintiff replied he "was sure they had."

Plaintiff, a lawyer and licensed real estate broker, testified that he specialized in the sale of "restaurant, tavern and business places"; that one Gus Stoyas, to whom he had sold a drug store, asked him "to get Mr. Morton a combination restaurant and bar"; that he submitted six or seven places to Morton, including Stefek's; that about the first of April 1947 plaintiff and Morton went to Stefek's place of business in Morton's automobile; that the witness had known Stefek ten or twelve years; that Stefek stated he wanted $45,000 net for his premises, and that the witness told Stefek "ten per cent" was the usual and customary charge for selling businesses.

Plaintiff further testified that he advertised Stefek's premises for sale in the Chicago Tribune ten or twelve times at $50,000, and that he took "at least a dozen people" to view Stefek's premises as prospective purchasers. The advertisements were not introduced in evidence nor did any of the prospective purchasers testify.

Defendant Morton testified that he met plaintiff in January or February 1947; that he called at plaintiff's office in February 1947 where he received some property listings which did not include the Stefek property; that plaintiff did not tell him about the Stefek property; and that he never went to Stefek's premises with Oram or plaintiff.

Defendant Morton further testified that on May 10, 1947 he formed the corporation known as 3546 Devon Avenue Corporation; that the incorporators are himself, his wife, and one Mitsopoulos; and that the deed conveying the premises here in controversy from Stefek to the corporation was not recorded in the Recorder's Office of Cook County until September 1947.

Defendant Stefek stated that he knew plaintiff for a number of years; that he was never on good terms with him; that defendant Morton never came to his place of business with plaintiff, nor did he engage plaintiff to sell his business; that Morton never mentioned plaintiff's name during the negotiations for the sale of the property.

Stefek further testified that he knew Oram for many years and authorized him to sell the property; that Oram did not tell the witness that he was employed by plaintiff; and that he mentioned plaintiff's name but once, whereupon the

witness stated, "I don't want any part of him". Defendant Stefek admits that he sold the premises to Morton on May 10, 1947, and that on May 12, 1947 he conveyed title to the 3546 Devon Avenue Corporation.

Plaintiff contends that the overwhelming weight of the evidence shows that he was retained by Stefek to sell the premises involved, and that the sale was effected through plaintiff's efforts.

The finding of the trial court in a cause tried without a jury is entitled on review to the same weight as the verdict of a jury and if the evidence is contradictory such finding will not be reversed on appeal unless it is contrary to the manifest weight of the evidence. (Winnetka Park Dist. v. Hopkins, 371 Ill. 46; Mayflower Sales Co. v. Frazier, 325 Ill. App. 314.) Plaintiff says that Stefek's testimony is contradicted by the witnesses Oram, Wiley, and Guswiler. Defendant insists that plaintiff's witnesses stood to gain by any recovery had from either of the defendants. The conflicting averments in the sworn answers of defendant Morton tended to discredit his testimony but Morton's testimony tended to corroborate that of Stefek. We must give due weight to the trial court's superior advantage in passing on the facts and judging the credibility of the witnesses, (Jorn v. Tallett, 341 Ill. App. 240.), and even though the trial court's findings are against the preponderance of the evidence we cannot disturb them unless they are clearly and manifestly so. In the instant case from a careful reading of the record we cannot say that the trial court's findings are clearly and manifestly against the weight of the evidence.

With respect to the charge of conspiracy plaintiff has not cited any authorities to support his theory of law to hold defendant Morton liable under the provisions of the Bulk Sales Act. We think this contention is without merit and that the finding and judgment in his favor was proper.

For the reasons given, the finding and judgment in favor of the defendants is affirmed.

AFFIRMED.

BURKE, P.J. AND KILEY, J. CONCUR.

45161

FRANK J. KOHUT, Appellee,	)	APPEAL FROM
v.	)	MUNICIPAL COURT
WILLIAM COWEL and PAUL BODNER, Appellants.	)	OF CHICAGO

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action for damages to his automobile resulting from a collision between plaintiff's automobile and an automobile owned by defendant Bodner and driven at the time of the occurrence by defendant Cowel. Trial by the court without a jury resulted in a finding and judgment in favor of plaintiff in the sum of $450. Defendants appeal.

Defendants' principal contention is that the finding of the trial court is against the manifest weight of the evidence.

The accident occurred about noon May 19, 1949, at the intersection of Chicago and Ashland avenues in the city of Chicago, Cook county, Illinois. There were three witnesses, the plaintiff, defendant Cowel, and one Albert C. Lucas, a police officer who testified in behalf of defendants. There is a sharp conflict in the testimony with respect to the speed of each vehicle as it approached the intersection and the color of the traffic light signals when the respective automobiles entered the intersection.

Plaintiff testified that he was proceeding west on Chicago avenue at about twenty miles an hour; that when he was about two hundred feet east of the intersection he observed that the traffic light signal for Chicago avenue was green; that after entering Ashland avenue about fifteen feet the traffic light signal turned amber; that after he had entered the intersection about twenty feet he saw defendants' car proceeding south straddling the southbound street car tracks in Ashland avenue at about twenty-five miles an hour; that the traffic signal light did not change to red until after the impact; that the automobiles collided twenty or twenty-five feet south of the north curb of Chicago avenue in the southbound street car tracks of Ashland avenue; and that he first saw defendants' automobile when it was at the south end of the safety island in Ashland avenue, which is located about fifteen feet north of the north curb line of Chicago avenue.

Defendant Cowel testified that at the time of the occurrence he was driving the automobile owned by defendant Bodner, with the latter's permission, south on Ashland avenue at about twenty miles an hour; that he observed the traffic lights when he was two hundred feet north of the safety island, at which time the traffic signal lights were amber; that shortly afterward the traffic signal lights turned green; that when he first saw plaintiff's automobile it was about a car length into the intersection proceeding west on Chicago avenue between thirty-five and forty miles an hour; and that when he entered the intersection the traffic signal lights were green for Ashland avenue.

Officer Lucas testified that he was sitting in a police squad car parked in Ashland avenue between two hundred and three hundred feet north of Chicago avenue facing south; that he had a clear vision of the traffic light at the intersection, and observed the automobile driven by Cowel when it passed the squad car; that about two seconds after the light changed he saw plaintiff's car run through the red light; that at the moment of impact his vision of the collision was obstructed momentarily by another passing automobile; that he did not see the accident, "I heard a thump."

Chapter 27, section 14 of the Municipal Code of Chicago provides, "Green or go--Traffic facing the signal may proceed except that vehicular traffic shall yield the right of way to pedestrians and vehicles legally within a crosswalk or the intersection at the time such signal is exhibited." Defendants insist that the evidence clearly shows plaintiff violated the Municipal Code by running through a red traffic signal light at the intersection and is therefore barred from a recovery.

It is undisputed that at the time of the occurrence it was raining. Plaintiff says it was "raining hard." The evidence discloses that at the time of the accident Officer Lucas was attending to other duties, and came to the scene of the accident about five minutes later. These circumstances, in the trial court's opinion as expressed by him in the record, tended to discredit the testimony of Officer Lucas. The finding of the trial court in a cause tried without a jury is entitled on review to the same weight as the verdict of a jury, and if the evidence is contradictory

such finding will not be reversed on appeal unless it is contrary to the manifest weight of the evidence. (Winnetka Park Dist. v. Hopkins, 371 Ill. 46; Mayflower Sales Co. v. Frazier, 325 Ill. App. 314.) Whether the plaintiff entered the intersection on the green light presented a question of fact. See Schneiderman v. Interstate Transit Lines, 394 Ill. 569.

We must give due weight to the trial court's superior advantage in passing on the facts and judging the credibility of the witnesses. (Jorn v. Tallett, 341 Ill. App. 240.)

From a careful reading of the record we cannot say that the finding is against the manifest weight of the evidence.

For the reasons given, the judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P. J., and KILEY, J., concur.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

October Term, A. D. 1950

Term No. 50-0-3 Agenda No. 2

HOSPITAL SISTERS OF ST. FRANCIS, Trading as ST. ELIZABETH'S HOSPITAL, and DR. EDWARD G. DEWEIN, Plaintiffs-Appellants, vs. COUNTY OF ST. CLAIR, ILLINOIS, and TOWN OF FREEBURG, ILLINOIS, Defendants-Appellees.	Appeal from the Circuit Court of St. Clair County, Illinois.

CULBERTSON, J.

Plaintiffs-Appellants herein, HOSPITAL SISTERS OF ST. FRANCIS, Trading as ST. ELIZABETH'S HOSPITAL, and DR. EDWARD G. DEWEIN, filed their complaint in the Circuit Court of St. Clair County against Defendants-Appellees, COUNTY OF ST. CLAIR, ILLINOIS, and TOWN OF FREEBURG, ILLINOIS. Defendants filed a motion to dismiss plaintiffs' complaint and on hearing, said motion was allowed, and leave was given plaintiffs to file an amended complaint, which was done. Defendants then filed a motion to dismiss the amended complaint and after a hearing the motion was allowed and the amended complaint dismissed. This appeal followed.

An order dismissing a complaint on a motion is not a final appealable order and it, therefore, becomes the duty of this Court to dismiss the appeal of Plaintiffs-Appellants herein. Said appeal is, accordingly, dismissed.

Appeal dismissed.

Scheineman, P.J., and Bardens, J. concur.
(Abstract)

45247

THE PEOPLE OF THE STATE OF ILLINOIS, on the relation of HARRY D. BUSBY, HENRY C. FANTER, FRED MAHLE, JAMES MULLALLY and MAX ZOLLA, Appellants,	APPEAL FROM
v.	SUPERIOR COURT
HARRY J. SMITH, individually and as President of the Village of River Grove, Illinois, GEORGE E. De COSTE, individually and as Village Clerk of the Village of River Grove, Illinois, MRS. ANNE E. SPEARING, individually and as Village Collector of the Village of River Grove, Illinois, and GEORGE R. SCHLESSER, individually and as Village Treasurer of the Village of River Grove, Illinois, Appellees.	COOK COUNTY

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Petitioners appeal from an order striking their petition for writ of mandamus and dismissing their suit.

The petitioners--tax payers, residents and citizens of the Village of River Grove--sought to compel an inspection of the books of the village, and alleged that they lacked the requisite training or experience to enable them to examine and inspect the books and records without the assistance and aid of an attorney and accountant, and that such assistance was necessary to enable them to effectually exercise their right of examination. The trial court held that the record clearly showed that respondents were ready and willing to allow petitioners to examine the records, but that the petition failed "to show any clear or undeniable right in petitioners to be accompanied by a nonresident attorney or accountant in their examination and inspection of the Village books and records."

It is a well recognized rule of law that whatever a party may do in his own proper person, he may, in general, do by an agent lawfully appointed. White Eagle Laundry Co. v. Slawek, 296 Ill. 240. It must be conceded as a matter of general knowledge that special skill and training is necessary for the intelligent examination of the official and fiscal records of a municipal corporation. On the allegations of the petition, an examination of the books and records of the village by the petitioners without the aid of an accountant and lawyer would have been useless and without purpose.

The order is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

Tuohy and Feinberg, JJ., Concur.

45156

WILLIAM P. LAUX, Appellant, v. JOHN W. KUMMER, Appellee.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

34 Ill. 448

MR. JUSTICE FLINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant for personal injuries under the guest section of the Uniform Motor Vehicle Act (Ch. 95 1/2, par. 58a, Ill. Rev. Stat. 1949), alleging that defendant was guilty of wilful and wanton misconduct, which proximately caused the injuries. Defendant filed an answer, denying the charge of negligence, and alleging that the plaintiff was guilty of wilful and wanton misconduct, which proximately contributed to cause his injuries. A trial with a jury resulted in a verdict of not guilty and judgment against plaintiff, from which judgment plaintiff appeals.

It appears from the evidence that plaintiff for the first time met defendant in a tavern, shortly before midnight of the day of the accident; that both plaintiff and defendant drank some intoxicating liquor; that plaintiff, having been there first, had a few drinks before defendant arrived; that defendant offered to drive plaintiff home in his car, and plaintiff accepted the invitation and became a guest of defendant; that defendant then drove his car north on Stockton Drive in Lincoln Park, under the jurisdiction and control of the Chicago Park District; that in Stockton Drive,

about 4 or 5 blocks away from the place of the accident in question, defendant reached a traffic light, showing red against him, and stopped his car; that while waiting for the light to change, another car passed defendant on his right side, through the red light; that the running of the other car through the red light incensed defendant to a degree that he determined to give chase to the other car, and at a high rate of speed followed the other car, intending to catch up with him.

Plaintiff testified (although defendant denied it) that he protested against the speed of defendant's car, and defendant's desire to give chase to the car which violated the traffic signal. When they reached a point in Stockton Drive where it intersects Dickens Avenue, the other car suddenly slowed down and turned left, apparently intending to enter Dickens Avenue. Defendant swerved his car to avoid a collision, causing his car to tip over, resulting in the claimed injuries to plaintiff. Defendant denied that he was intoxicated, and the evidence does not establish that defendant was under the influence of intoxicating liquor to the extent that he was unable to drive or control his car.

Plaintiff seeks a reversal for alleged errors of the trial court in refusing to admit evidence of a regulation by the Chicago Park District as to the restricted speed on Stockton Drive, within its jurisdiction; in refusing to permit evidence of a restricted speed notice posted on Stockton Drive by the authority of the Park District; and the giving of instruction No. 5, which we shall presently discuss.

The Motor Vehicle Act, par. 123, provides:

> "(a) The provisions of this Act shall not be deemed to prevent local authorities with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power from--
>
> * * *
>
> 5. Regulating the speed of vehicles in public parks;
>
> * * *
>
> (b) No ordinance or regulation enacted under subdivisions * * * (5) * * * of this section shall be effective until signs giving notice of such local traffic regulations are posted upon or at the entrances to the highway or part thereof affected as may be most appropriate."

Under this statute the Chicago Park District had the power to adopt a regulation as to speed within parks under its jurisdiction. Its duty was to post appropriate signs as to such restricted speed. Evidence of such regulation by the Park District and the posting of such signs is competent. This, in turn, would have a material bearing upon the allegation and proof, if any, of the wilful and wanton misconduct of defendant.

The court, however, was not in error in refusing to admit the offered evidence of the regulation by the Park District as to speed and the existence of posted signs, because the complaint failed to comply with Rule 13 of the Supreme Court, which provides:

> "(1) Where a breach of statutory duty is alleged, the statute shall be cited in connection with such allegation."

Not only did the complaint fail to cite the statute or regulation relied upon, but failed to allege a violation of the statute or regulation of the Park District fixing the speed limit on Stockton Drive.

Instruction No. 5, given on behalf of defendant, reads:

> "If you believe from the evidence that the plaintiff and the defendant were both guilty of wilful and wanton misconduct which approximately contributed to the injury or damage complained of, then you are instructed that you have no right to compare the wilful and wanton misconduct of the plaintiff with that of the defendant, and find a verdict according to which side you think was guilty of the greater degree of wilful and wanton misconduct, for in such case it is the law that it makes no difference which was guilty of the greater degree of wilful and wanton misconduct. Under such circumstances the plaintiff cannot recover."

This instruction directed a verdict and was not based upon any evidence or upon any reasonable inference to be drawn from the evidence most favorable to defendant, which would tend to prove wilful and wanton misconduct on the part of plaintiff. True, if plaintiff were guilty of wilful and wanton misconduct, he could not recover, and the instruction would be proper under the allegation in the answer. But how plaintiff, under the circumstances disclosed, as a guest in the car of defendant, could be guilty of wilful and wanton misconduct, in the instant case, we cannot perceive. In Greene v. Citro, 298 Ill. App. 25, at p. 30, this court said:

> "If all the passenger-guests should constantly be warning and directing the driver how to proceed he would be so distracted as to be unable to drive the car carefully. Back seat driving should not be encouraged."

Chandler v. Chicago Transit Authority, 337 Ill. App. 655 (leave to appeal denied by the Supreme Court). It was error to give this instruction. The judgment is reversed and cause remanded for a new trial.

REVERSED AND REMANDED.

Niemeyer, P. J., and Tuohy, J., concur.

45211

CITY OF CHICAGO, a Municipal corporation, Appellee, v. OCTIGAN DROP FORGE COMPANY, a corporation, and WILLIAM HIRSH, president, Appellants.	APPEAL FROM THE MUNICIPAL COURT OF CHICAGO.

373

342 I.A. 149

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff brought two actions against defendant in the Municipal Court of Chicago; one was for the violation of the nuisance ordinance (§§99-34 and 99-60 of the Municipal Code of Chicago), and the other for violation of the zoning ordinance (§§194A-8 and 194A-12 of the Municipal Code). The actions were filed in 1946. For convenience the first will be referred to as the nuisance case, the second as the zoning case. On the same day both cases were on the trial call when reached. After a lengthy trial of the nuisance case, the court on March 21, 1949, found defendant not guilty. At the same time the finding of not guilty was also entered in the zoning case.

On February 7, 1950, almost one year later, plaintiff filed its petition asking the court to expunge the order of not guilty in the zoning case, because, as it alleged, it was the understanding of the parties that the nuisance case would be the only one heard and considered by the court, and that the zoning case was not to be heard because a certiorari proceeding was then pending in the Circuit Court of Cook County to review the action of the

zoning appeal board involving the same property; that when the nuisance and zoning cases were called, the trial judge was apprised of the agreement between the parties not to try the zoning case. It prays that the judgment be expunged because the order entered by the clerk in the zoning case constituted a mere misprision, and that the record should accordingly be corrected.

An answer was filed to the petition, which alleged that the order entered in the zoning case on March 21, 1949, reads as follows:

> "The said defendant being duly advised by the Court as to his right to a trial by jury in this cause, elects to waive trial by jury, and this cause is, by agreement in open Court between the parties hereto, submitted to the Court for trial without a jury.
>
> "Now come the parties to this cause, and thereupon this cause comes on in regular course for trial; before the Court without a jury and the Court having heard the evidence and the arguments of counsel, and being fully advised in the premises, enters the following finding, to-wit:
>
> "'The Court Finds the Defendant Not Guilty.'
>
> "This cause coming on for further proceedings herein, it is considered by the Court that final judgment be entered on the finding herein, that the plaintiff take nothing by this suit, and it is ordered that said defendant be and hereby is discharged."

The answer further alleged that a notation of said order was made on said date by Judge Cecil Smith, the trial judge, on his daily trial sheet for said date, as will appear more fully on said trial sheet. This latter averment in the answer was not denied by any counter-affidavit.

The court considered the matter on the petition and the answer and their supporting affidavits, and entered an order vacating the finding of not guilty and judgment in the zoning case.

Plaintiff has treated the petition referred to as one seeking relief under section 72 of the Civil Practice Act in the nature of a writ of error coram nobis, and to declare the entry of the judgment order in the zoning case as a misprision of the clerk, and to correct same.

In Jacobson v. Ashkinaze, 337 Ill. 141, followed in People v. Bristow, 391 Ill. 101, the court said:

> "The purpose of the writ coram nobis at common law, and of the statutory motion substituted for it in this State, is to bring before the court rendering the judgment matters of fact not appearing of record, which, if known at the time the judgment was rendered, would have prevented its rendition. Illustrations of such matters are the disability of the parties to sue or defend, the failure of the clerk to file a plea or answer, and the omission to interpose, through fraud, duress or excusable mistake and without negligence on the part of the defendant, a valid defense existing in the facts in the case. The motion is not available to review questions of fact which arise upon the pleadings or to correct errors of the court upon questions of law. * * *The essentials of the proceeding under the statute are the same as they were at common law." (Italics ours.)

The petition does not set up any fact which, if known by the court, would have prevented the rendition and entry of the judgment order--that is to say, any fact in the category outlined in the cited case. If the court was apprised, as the petition alleged, that it was not to hear and consider the zoning case, then it necessarily follows that it knew of that fact and not that it was in ignorance of the fact. Whether this petition be treated as one in the

nature of a writ of error coram nobis or to expunge an order entered by misprision of the clerk, the holding in McCord v. Briggs & Turivas, 338 Ill. 158, 164-165, is controlling against plaintiff's position. It was there said:

> "While it may not be doubted that the court has power at all times, upon notice given, to reform its records so as to make them speak the truth, whether such action be taken because of a misprision of the clerk or a malfeasance, and such amendments may be made at any time as long as the court has before it the proper memoranda as the basis for its conclusion, (People v. Holmes, 312 Ill. 284,) yet an order amending a record after the expiration of the term at which the record is made must be based on some note or memorandum from the records or quasi-records of the court, or on the judge's minutes, or some entry in some book required by law to be kept, or in the papers on file in the cause. It cannot be determined from the memory of witnesses or by the recollection of the judge. The record of the court imports absolute verity, and the note or memorandum which would authorize its amendment after adjournment of the term must necessarily be a note or memorandum which could be said to have been made by the judge or pursuant to a requirement of the judge or of the law. (Wesley Hospital v. Strong, 233 Ill. 153.) After the adjournment of a term of court at which a judgment is entered it cannot be set aside or overcome by affidavit. (Loew v. Krausse, 320 Ill. 244; People v. Weinstein, 290 id. 264; Kelly v. City of Chicago, 148 id 90.) In this case there is no note or memorandum indicating a material misprision of the clerk concerning the order actually entered. * * *
>
> "* * * Under section 89 a final judgment or order can be reversed or recalled after the term of court at which it was entered, for such errors of fact, only, as could have been corrected under a writ of error coram nobis. The motion or petition provided by section 89 is the commencement of a new suit. The error of fact which may be assigned in such proceeding must be of some fact unknown to the court at the time the judgment was rendered, as well as one which would have precluded the rendition of the judgment had it been within the knowledge of the court at the time. The error of fact alleged must not be one appearing on the face of the record or one contradicting the finding of the court." (Italics ours.)

As already pointed out, the answer to the petition alleged that the trial judge made the notation on his daily trial sheet, directing the entry of the order in question, and was not denied by any counter-affidavit. Therefore, the note or memorandum of the trial judge, which the plaintiff must rely upon to correct the record, could not support the position of plaintiff. The rule of long standing, that a record imports verity and cannot be impeached or corrected except in the precise modes prescribed by law, is a salutary one, and should be adhered to even though it may appear to afford a technical advantage to the one seeking to sustain the record.

The Municipal Court was without jurisdiction to enter the order vacating the judgment order of March 21, 1949, and accordingly the order is reversed.

ORDER REVERSED.

Niemeyer, P. J., and Tuohy, J., concur.

45214

BLANCHE FRONCZKE, Appellee, v. CONTINENTAL ASSURANCE COMPANY, a corporation, Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

374

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff, as beneficiary in a policy issued by defendant on the life of her son, John Fronczke, deceased, brought an action to recover the amount of the policy. A trial with a jury resulted in a verdict and judgment for $2,000 for plaintiff, from which defendant appeals.

Deceased was employed by the Parisian Novelty Company, as a plastic worker, for approximately four years before his death. The company in February, 1947, took out a group insurance policy covering its employees, including deceased, and a certificate in the amount of $2,000 was issued to deceased, naming plaintiff, his mother, as beneficiary. The certificate contained a provision that "All rights, privileges and benefits are governed by the provisions of the Group Policy." The group policy contained these provisions:

> "The Employer shall furnish the Company with the names of all Employees initially insured and of all Employees who from time to time become eligible for insurance in accordance with such Plan, <u>and of all Employees whose insurance ceases through termination of employment or otherwise prior to discontinuance of this Policy</u>, together with the respective dates and other necessary data to determine the premiums hereunder.

" * * *

"CONVERSION PRIVILEGE:--

"* * *

"In case of termination, for any reason whatsoever, of employment of any Employee, while insured under this Policy, such Employee shall be entitled to have issued to him by the Company without further evidence of insurability, and upon application made to the Company within thirty-one days after such termination and upon the payment of the premium applicable to the class of risks to which he belongs and to the form and amount of the Policy at his then attained age, a policy of life insurance, in any one of the forms customarily issued by the Company, except term insurance, in an amount equal to the amount of the Employee's protection under this Policy at the time of the termination of his employment. Upon the death of any such Employee during such thirty-one day period and before any such individual policy has become effective, the amount of insurance for which such Employee was entitled to make application shall be payable as a death benefit by the insurer. * * *

"* * *

"TERMINATION OF INDIVIDUAL INSURANCE:-

"The insurance of any Employee covered hereunder shall terminate upon the happening of either one of the following events, whichever shall first occur: * * * (c) Termination of his employment with Employer * * *." (Italics ours.)

The determining questions upon this appeal, upon the facts presented in this record, are, when did the employment of deceased terminate, and did his death occur within the thirty-one day period of such termination under the quoted conversion privilege in the policy?

It appears without dispute from the testimony of Victor Joseph, vice-president of the employer company, called by plaintiff as her witness, that deceased about August 15, 1947, applied to him for a leave of absence,

deceased explaining to him "that he was planning on leaving the concern to go in business for himself"; that there was a question in his mind as to whether he was going to be successful in this contemplated business, and stating that if it proved unsuccessful, he would like to be able to come back to his job; that the witness told deceased that the company did not issue leaves of absence, but that if his position were open or they had an opening for him, "we would certainly be more than glad to have him back because he was leaving in good grace, and he was a good worker. With that understanding he left"; that he told him if he came back, he would be treated as a new employee; that the witness saw deceased quite often after August 15; that the witness talked with deceased again about three or four weeks after he "left" the concern. The witness testified, "He called about that. I talked to him. I recognized his voice. He said he did not believe his business was going to prove successful and he wanted to know whether or not he could 'come back to work', and I told him at that time that he could, and then he came in. I spoke to him in the building itself at our front entrance, and at that time he said he came in there and he wanted to make sure about getting his job back, and I told him Yes, he would get his same job back because we had not filled it. So he said, 'That is fine. I will be in next Monday.' That is the last time I spoke to him. I never saw him after that." No mention was made of insurance or seniority rights, but that "when he came back in, we would

take care of all our preliminary work that we had to do before we hired any new employee." The employees paid no part of the premium under the group insurance policy. The entry appearing on the employment card record of deceased, regularly kept in the files of the company, "L.C., 8/30/47," meant he left company on that date, and was made under his supervision and direction and was forwarded to the insurance company.

The last pay check which deceased received from his employer was for the week ending prior to Labor Day of 1947. Plaintiff testified that on Tuesday following Labor Day, she went to the bedroom of deceased, found him asleep, she woke him, and then he went to the telephone and made a call, and she heard him say, "Can I take off today? I want to be home." Neither the number he called nor the person to whom he spoke is identified. The witness Joseph denied he had any call from deceased on that day or heard any such request. Plaintiff further testified that she spent all that day with her son; that he closed a deal for a partnership interest in a tavern; that a lease was made out to the partnership, Frenczko and Berlouski; that the lease was for three years with a two year option; that for the next week or ten days after the purchase of the partnership interest, he slept in a room above the tavern; that on Thursday following, deceased disappeared; that nothing was heard of him until more than a week after his disappearance; that he called plaintiff from Florida about 2 o'clock in the morning and, complying with his request,

she telegraphed him $65 through the Western Union Telegraph Company on September 19, 1947; that deceased came home the Sunday following the sending of the money; that he slept continuously for fourteen hours; that at the end of that week he again disappeared, and she did not see him again until after his death on October 4. Deceased never returned to the tavern after his first disappearance.

Plaintiff contends that there is no evidence of termination of employment of deceased prior to his death; that defendant had the burden of proving such termination to escape liability on the policy; and further that a contract was entered into January 23, 1947, between the employer and the union of which deceased was a member, governing the hours, wages and conditions of labor of the employees, including deceased; that Article VIII of said contract, relating to seniority, provides:

"SENIORITY

"Section 9. An employe shall lose his seniority rights and his continuity of employment under the following conditions only:

"* * *

"(c) If he is absent from work for three working days without notifying the Company, except in cases of accident or illness where the employe is unable to notify the Company;"

that under said provision the employer could not have rightfully discharged deceased before September 5, 1947, which was three working days after August 30, 1947, and since deceased died within the thirty-one day period

following September 5, 1947, defendant therefore became liable upon the policy.

We cannot agree with plaintiff's contentions. The evidence for plaintiff clearly demonstrates a termination of employment more than thirty-one days prior to the death of the insured. The entire conduct of the insured is consistent with the position taken by defendant that the insured quit his employment with the understanding that, if his business venture proved unsuccessful at any time thereafter, he could return to his employer if there was an opening. The record of employment, as already pointed out, recorded the fact that insured left the company.

The provision in the labor contract referred to, relied upon by plaintiff, is not, in our opinion, applicable here, since it refers only to the matter of seniority rights. It has no relation to the termination of employment in the instant case, under the circumstances disclosed.

The trial court should have directed a verdict for the defendant at the close of all the evidence, or subsequent to the verdict should have allowed the motion of defendant for judgment notwithstanding the verdict. Plaintiff is not entitled to recover, and the judgment is reversed.

REVERSED.

Niemeyer, P.J., concurs.

Tuohy, J., dissents.

OVER

Tuohy, J., dissents.

The policy of insurance here involved provides that it shall terminate upon the termination of insured's employment--extended by a 31-day grace period. Establishment of the date of the termination of employment of plaintiff's intestate, hereinafter referred to as employee, is the ultimate fact determinative of the issues herein.

It is not contended that the employee expressly, or in any formal sense, resigned; neither is there any contention that he was discharged. The employee failed to report for work on Tuesday, September 2, 1947, following the 3-day Labor Day vacation, under circumstances from which the majority infers that he terminated his employment on August 30, 1947. The employee died October 4, 1947, without having resumed his employment.

This inference disregards the terms of the contract of employment herein, Section 9, Article VIII, of which provides:

> "An employe shall lose his seniority rights and his continuity of employment under the following conditions only:
>
> (a) If he resigns.
> (b) If he is discharged for just cause.
> (c) If he is absent from work for three working days without notifying the Company, except in cases of accident or illness * * *."

There was no express or formal resignation and there was no discharge; the employment termination must, therefore, be found under section (c) above. Under this provision, however, there was no right of termination in the employer

until three days after the failure of the employee to return to work. This would place the earliest date the employment could be terminated on September 5th. Thereafter would ensue a grace period of 31 days which continued the insurance in force until after insured's death October 4th. Nor may it be held by this court that there was an implied resignation under the facts and circumstances set forth in the majority opinion. The jury by their finding in favor of plaintiff decided that the contract did not so terminate.

The majority opinion, by this reversal, has held as a matter of law that the employment contract terminated on August 30th. In my opinion the evidence does not justify such a conclusion. Where reasonable men acting within the limits prescribed by law might reach different conclusions, or different inferences could reasonably be drawn from the admitted or established facts, the question is one of fact for the jury. Mueller v. Phelps, 252 Ill. 630, 634.

The judgment of the Superior Court of Cook County should be affirmed.

45184

JOHN H. BRAND, Appellant, v. DR. WILLIAM WILSON, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought his suit in forcible entry and detainer in the Municipal Court of Chicago for possession of premises, a portion of which was occupied by defendant, and for rent due thereon. The cause was tried by the court without a jury, and from a judgment for defendant, plaintiff appeals.

Plaintiff is the owner of a building located at 4224 West Fullerton Avenue in the City of Chicago. Defendant, a physician and surgeon, had leased space in the building since January, 1940. He occupied two rooms of a six-room apartment as a doctor's office and reception room, the balance of the apartment being used as living quarters by persons not parties here, who rented from and paid their rent, until 1945, directly to the plaintiff. Sometime in the year of 1945 plaintiff and defendant had a conversation with reference to procuring a doctor as tenant for the space theretofore used as an apartment.

Plaintiff maintains that there was an oral agreement made in May of 1945 between plaintiff and defendant whereby defendant rented the entire six rooms at a

monthly rental of $72.50; that in June of 1947 the rent was increased to $82.50 and in October, 1947, to $100.00; that defendant subleased that portion of the premises which was not occupied by him for professional purposes.

Defendant maintains that there was never any agreement between plaintiff and defendant for the leasing by defendant of any space other than the two rooms used as an office; that after 1945, being unable to procure a professional tenant, he collected, as the agent of plaintiff, the rent for the remainder of the six rooms other than that occupied by him merely as an accommodation for plaintiff.

It appears further that in July, 1949, there was a conversation between plaintiff and defendant in which plaintiff sought to increase the office rent to $100.00 for the months of July, August, and September, and $125.00 from October on, the rental for the flat to be $37.50 as theretofore. An alternative proposition was submitted, that if defendant would vacate the premises on August 31st there would be no increase for rent. Defendant moved from his office on August 13th. Plaintiff testified that defendant vacated only that portion of the premises occupied as an office, and that not completely, but that the portion occupied as living quarters continued to be occupied by defendant's subtenant. He further testified that the keys to the premises were never turned over to him. Defendant testified that he vacated the two rooms occupied as office and reception room, which he insists are all that he leased from plaintiff.

The entire matter thus resolves itself into an issue of fact as to whether or not the leasing was of two rooms or of the entire six-room apartment. There was no substantial corroboration offered on either side--it being plaintiff's testimony against defendant's. We have frequently held that where the evidence is heard by the trial judge who sees the witnesses and hears them testify, he has a better opportunity for determining the weight and credit that should be given their testimony than does a court of review, and under such circumstances a court of review will not disturb the findings of the court unless manifestly and palpably wrong. In re Estate of Sandusky, 321 Ill. App. 1. We are unable to say on the record before us that the trial court's findings were manifestly against the weight of the evidence.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Niemeyer, P. J., and Feinberg, J., concur.

45197

LUDWIG RUPPANER, Appellee,	)	APPEAL FROM
v.	)	SUPERIOR COURT
WILLIAM F. WAUE, Appellant.	)	COOK COUNTY

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment entered on a verdict for $10,500 returned by a jury in the Superior Court of Cook County in an action for damages for personal injuries.

The accident happened about 10:00 p.m. December 26, 1947, near the intersection of Northwest Highway with Long Avenue in Chicago, Illinois, when plaintiff, in the act of crossing said highway from west to east, was struck by a motor vehicle driven by defendant in a northwesterly direction. Northwest Highway at the point where the accident happened is a thirty-foot street extending southeasterly to northwesterly. Long Avenue runs in a northerly direction from the northeast curb of Northwest Highway. A third street, Argyle, runs in a generally easterly direction and converges with Long Avenue at the northeast curb line of Northwest Highway. Both Long Avenue and Argyle Street terminate at Northwest Highway. Paralleling Northwest Highway are the tracks of the Chicago and North Western Railway Company, and between the tracks and Northwest Highway is the Jefferson Park railway station. Vehicular traffic, as well as pedestrian, reaches the railway station from Northwest Highway by means of a semi-circular concrete-paved drive.

The place where plaintiff sought to cross the highway, about opposite the center of the semi-circular driveway, was unmarked by painted boundary lines or otherwise, although there was evidence tending to show that it was customarily used by pedestrians for crossing the street from the railway station to the walk on the opposite side.

Considerable controversy arises over whether or not the place where plaintiff sought to cross was a crosswalk. Several of the witnesses so referred to it, but defendant argues vigorously that it was not. We conclude from the evidence in this record that the trial court properly treated the matter as a question of fact. This being so, it was not error to give an instruction defining crosswalk.

Complaint is made by the defendant that plaintiff is guilty of contributory negligence as a matter of law. It would unduly extend this opinion to review all the conflicting testimony, but sufficient evidence appears in the record to raise a question of fact as to plaintiff's contributory negligence.

The principal question for our consideration is the admission in evidence by the trial court, on motion of plaintiff, of a police report, plaintiff's exhibit 34. This police report was clearly inadmissible. D'Oranzo v. Lacny, 330 Ill. App. 333; Hoskins v. Zimmerman, 334 Ill. App. 395. Counsel for plaintiff recognized that the document was inadmissible, and, in response to the court's questioning as to whether he intended to introduce it in

evidence, stated that he considered it improper. However, after further questioning by the court, counsel, presumably concluding that the jury might draw inferences unfavorable to his cause if he persisted in his refusal, offered the document in evidence--obviously against his better judgment. Over defendant's objection the document was admitted.

The fact that the error was invited by the trial judge renders it none the less prejudicial. Papua v. Zatz, 340 Ill. App. 642. Counsel now contend that the document, while admittedly improper, was not prejudicial. We do not agree with this contention. These police officers who signed the report were not present at the scene of the accident, and their only information as to the facts was hearsay. The statement that the defendant was driving too fast under existing conditions clearly invaded the province of the jury. In effect, the jury were advised by officers of the law, with the apparent approval of the trial judge, that the accident was the fault of the defendant. The testimony was extremely prejudicial.

Plaintiff urges that proper objection was not made to this testimony. We disagree. Defendant made a general objection before being called upon by the court to particularize. The admissibility of this document raised a question of substance as distinguished from one of mere form, and its competency was properly raised by general objection.

For error in the admission of this document, the judgment of the Superior Court of Cook County is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Niemeyer, P. J., and Feinberg, J., concur.

45228

RAY E. LANE, Appellee,	)	APPEAL FROM
v.	)	COUNTY COURT
WILLIAM ESTEP and DORA ESTEP, Appellants.	)	COOK COUNTY

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Plaintiff Ray E. Lane, a licensed attorney of this State, sued defendants William Estep and Dora Estep, husband and wife, for legal services rendered and expenses paid on behalf of both defendants during the period beginning November 16, 1945, and ending December 26, 1947. There was a trial by a jury and verdict for plaintiff in the sum of $1900, from which amount a remittitur of $106.37 was voluntarily entered by the plaintiff, and judgment for $1793.63 entered upon the verdict so remitted.

It is contended that the verdict of the jury is contrary to the manifest weight of the evidence. We consider it unnecessary to set forth in detail the voluminous evidence in the case. It is not disputed that plaintiff was hired as an attorney by the defendant William Estep to represent him in a number of matters requiring legal services to be performed in the City of Chicago and other places, and that at the time that plaintiff was hired the defendant Dora Estep was present and a party to the negotiations leading up to the retaining of plaintiff as attorney in matters in which both defendants were directly involved.

Nor is it disputed that from November 16, 1945, until December 26, 1947, plaintiff performed numerous services in matters in which defendant William Estep was involved. The disputed questions are the claims that plaintiff had been paid in full for the services performed; that he had made numerous charges and overcharges for which proper credits were not given; that plaintiff had received and accepted the sum of $1667.35 from defendants under circumstances amounting to accord and satisfaction; and that there was no proof that the amount charged by plaintiff was a reasonable amount.

Conflicting testimony on each of these points was introduced. Where the evidence is conflicting, it is the duty of the jury to determine the facts and an Appellate Court is not justified in substituting its judgment for that of the jury. Oran v. Kraft-Phenix Cheese Corp., 324 Ill. App. 463. There was ample evidence to substantiate the plaintiff's contentions in this record if believed by the jury, and we cannot say from a review of the entire record that the result arrived at is against the manifest weight of the evidence.

Defendants also urge that plaintiff's claim against Dora Estep is barred by the statute of frauds inasmuch as her undertaking was one to answer for the debt of another person and was not evidenced by a writing. We think a question of fact was properly raised under the evidence in this case as to whether or not Dora Estep was a principal in the transaction and whether the obligation

as to her was a primary one. The verdict of the jury has decided this question adversely to defendant Dora Estep's contention.

We have examined the instructions complained of and we find no reversible error contained therein.

The judgment of the County Court of Cook County is therefore affirmed.

AFFIRMED.

Niemeyer, P. J., and Feinberg, J., concur.

45239

In the Matter of the Estate of
MARTHA CZECH KRITSCH, Deceased.

HENRY O. CZECH, individually and as Conservator of the Estate of Else Czech, an incompetent, et al.,

Appellants,

v.

GUSTAV E. KRITSCH,

Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Elizabeth Sebeck, Henry Czech, Myrtle Czech, and Else Czech by her conservator, Henry Czech, filed their petition in the Probate Court of Cook County to correct a declaration of heirship. They allege themselves to be the surviving brother and sisters and heirs at law of Martha Czech Kritsch, deceased. In the table of heirship Gustav E. Kritsch was declared an heir at law and surviving husband of Martha Czech Kritsch. Petitioners allege that Gusatv E. Kritsch was not the lawful husband of the deceased Martha Czech Kritsch, by reason of the fact that Gustav and Martha were first cousins and that their alleged marriage was incestuous and void by virtue of chapter 89, paragraph 1, Illinois Revised Statutes, entitled Marriages. Motion to strike the petition alleged that Gustav E. Kritsch was the lawful husband of Martha Czech Kritsch at the time of her decease, and denied that he was a cousin of the first blood of Martha Czech Kritsch. After a lengthy

hearing in the Probate Court the petition was dismissed.

The matter was appealed to the Circuit Court of Cook County where there is a hearing de novo, at the conclusion of which the court found that the evidence presented by the petitioners was insufficient to prove that the relationship of first cousin existed between respondent and deceased, denied the relief prayed for in the petition, and assessed costs against the respondent. Objections were filed to the entry of said order, and a further order was entered on the same day, March 3, 1950, overruling and denying the objections and exceptions of the petitioners to the prior order. From these orders of the Circuit Court the matter comes here on appeal.

The statute is clear that marriages between first cousins are incestuous and void. The principal contention is that the finding of the Circuit Court of Cook County, to the effect that decedent and respondent were not first cousins, is against the manifest weight of the evidence. Complaint is also made of failure of the trial court to permit facts to be introduced in evidence, although no remandment order or new trial is sought.

The undisputed evidence establishes that respondent Gustav E. Kritsch came to this country from Germany on September 13, 1930, being then of the age of twenty-five years. On the following day he was met at Chicago,

Illinois, by the decedent Martha Kritsch, her sister, Irene Stoker, and the latter's husband, A. H. Stoker. Later Gustav Kritsch went to the home of Martha, where he maintained lodgings until his marriage to Martha, in Chicago, Illinois, on December 21, 1930. Gustav and Martha Kritsch continued to live together as husband and wife until the latter's death on September 10, 1944. No children were born of the marriage. On September 7, 1945, Irene Stoker filed her petition in the Probate Court of Cook County to amend the table of heirship on the same grounds upon which the present petition is based. The record shows that some settlement was afterwards made with Irene Stoker and she is not a party to the present proceedings. Some three and one-half years after the death of Martha, in March of 1948, the present petition was filed.

The disputed contention of petitioners, that respondent and deceased were first cousins, rests wholly upon the testimony introduced by way of deposition of one Alvina Hagedorn, an 84 year old woman residing at the Lutheran Home for the Aged at Wauwatosa, Wisconsin, together with certain alleged admissions against interest made by the respondent. Alvina Hagedorn testified that August Kritsch was the brother of Johanna Kritsch and the father of Gustav Kritsch; that Johanna Kritsch and Carl Czech were the parents of Martha Czech Kritsch and that Martha and Gustav were therefore first cousins.

She stated that she is a sister of Carl Czech, Martha's father, and that she knew the families in Germany. The alleged admissions made by Gustav Kritsch are to the effect that he had referred to Martha Czech Kritsch on prior occasions as his cousin; that at the time he made application for an immigration visa he stated that his passage was paid for by his cousin Martha Czech, of Chicago, Illinois; and that his wife Martha had told him after their marriage that they were cousins.

In his own behalf respondent testified that he was acquainted with his father's two sisters and that his father had no sister by the name of Johanna, only Ida and Alvina. He denied emphatically a conversation testified to by Henry Czech that he had told Henry Czech that he and Martha were first cousins. He admitted that he made application for visa in which he stated that Martha was a cousin. He explained this by stating that it was customary in the town from which he had come to refer to distant relatives as cousins; and that he had always assumed that Martha Czech was distantly related, though not a first cousin. He denied categorically that Martha was his first cousin or that his father and Johanna Kritsch were brother and sister.

Petitioners sought to introduce certain other testimony by way of admissions against interest, which was ruled out by the trial judge. No offer of proof as to what these witnesses would have testified was made, and

we are therefore in no position to review the alleged errors on this score. Furthermore, as indicated above, no remandment or new trial is sought.

The record in this case is not altogether satisfactory inasmuch as the evidence depends largely upon the testimony of one witness and a categorical denial of that testimony by an interested party. The cause has been heard by two careful trial judges and both have found the evidence not sufficient to void the marriage. They no doubt were influenced in arriving at these decisions by the strong presumption which exists in favor of the validity of marriage where the ceremony has actually been performed. Our Supreme Court, in the case of Reifschneider v. Reifschneider, 241 Ill. 92, said at page 97:

> "Manifestly, from the evidence already referred to, both parties to this marriage contract believed it was legal at the time, and there is no contradiction of the fact that the ceremony was performed. This court, in Cartwright v. McGown, 121 Ill. 388, said, on page 396: 'When the celebration of a marriage is once shown, the contract of marriage, the capacity of the parties, and, in fact, everything necessary to the validity of the marriage, in the absence of proof to the contrary, will be presumed.' * * * When a marriage is shown the law raises a strong presumption in favor of its validity, and the burden is cast upon the party objecting to the validity to prove such facts and circumstances as necessarily establish its invalidity. Jones v. Gilbert, 135 Ill. 27."

To the same effect are the later cases of Crysler v. Crysler, 330 Ill. 74, 77; and Criss v. Industrial Commission et al., 348 Ill. 75, 79. In the case of Matthes v. Matthes, 193 Ill. App. 515, a strong statement of the rule appears at page 524:

> "The law is well established that in the absence of evidence to the contrary, an actual marriage is presumed regular and valid, and though such presumption may be rebutted, yet evidence of invalidating facts must be strong, distinct, satisfactory and conclusive; and if there is any evidence to support a finding in favor of the marriage it will be sustained."

In the instant case the parties lived together for fourteen years. The marriage was terminated only by the death of one of the parties. It was never challenged during its existence by any of the parties hereto or anyone else, although the alleged facts upon which it is now sought to have this long, apparently harmonious, union declared incestuous and void, were as well known to them then as they were at the time of Martha's death. It may well be inferred that the parties hereto did not dare to challenge the marriage during the lifetime of Martha, because her testimony would have been fatal to their present contentions.

The most satisfactory evidence in this case would have been the records from Germany whence all these parties came. In the absence of such proof petitioners were compelled to rely upon the recollection of an elderly woman as to matters occurring many years before. The weight to be given this testimony was for the trial judge.

The chancellor saw and heard the respondent testify. He was undoubtedly impressed with the honesty and straightforwardness of the respondent. It is a well established principle of law that it is not within the

province of this court to substitute its judgment for that of the triers of fact, who saw and heard the witnesses, where there is conflict in the testimony, unless the result reached is clearly against the manifest weight of the evidence. We are unable to say that the conclusions arrived at by the chancellor are against the manifest weight of the evidence.

The orders of the Circuit Court are therefore affirmed.

AFFIRMED.

Niemeyer, P. J., and Feinberg, J. concur.

45262

JOHANNE DONNELLY, a Minor, by JOSEPH DONNELLY, her father and next friend,
Appellant,

v.

REAL ESTATE MANAGEMENT CORPORATION, a corporation, et al.,
Defendants below

HYDE PARK-LAKE PARK BUILDING CORPORATION, a corporation, and LOUIS DJIKAS, doing business as LEMECK'S RESTAURANT,
Appellees.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY

MR. JUSTICE TUCHY DELIVERED THE OPINION OF THE COURT.

Plaintiff, Johanne Donnelly, a minor, by her father and next friend, Joseph Donnelly, brought suit to recover damages for personal injuries sustained by her as a result of falling into a sidewalk elevator shaft, the doors of which were open at the time of the fall. Defendant Real Estate Management Corporation was dismissed by stipulation of the parties, and a verdict of not guilty was directed as to the remaining defendants at the close of the plaintiff's evidence, in a trial before a jury. From this judgment plaintiff appeals.

In deciding this case we have disregarded the question of variance between complaint and proof raised by defendant, and have viewed the cause as though the complaint were in proper form to meet the objection.

The sole question for our determination is whether or not plaintiff was guilty of contributory negligence as a matter of law.

The evidence established that plaintiff was a high school girl just past fourteen years of age on the day of the accident which occurred Sunday, September 28, 1947, about 1:30 o'clock in the afternoon. Accompanied by two girl companions about the same age, she was walking north along the west sidewalk of Lake Park Avenue, a north and south street, between 53rd and 54th streets (running east and west), in the City of Chicago. The girls were en route to a motion picture theater. The sidewalk was ten or twelve feet from the building line to curb. Near the southwest corner of 53rd Street and Lake Park Avenue was an elevator shaft about six feet deep in which an elevator was maintained and operated from the sidewalk to the basement of the restaurant by defendant Louis Djikas, doing business as Lemeck's Restaurant. The premises wherein the restaurant was located was owned by defendant Hyde Park-Lake Park Building Corporation. The top of the shaft at street level was covered by two metal trap doors which opened from the center, each door being about two and one-half to three feet wide, so that when the doors were open they extended two and one-half to three feet above the sidewalk level. On the day of the accident the trap doors had been opened about ten o'clock in the morning for the purpose of permitting air to get into the basement. The doors were inclined slightly inward, but were

substantially perpendicular. As the girls approached the open hatch, they were walking three abreast, plaintiff being on the inside--furthest from the curb and nearest to the elevator hatchway.

Each of the companions of Johanne testified that she noticed the open shaft some distance before reaching it. The witness Frances Land's version of the accident is as follows:

> "I was about twenty feet from the elevator shaft when I saw it. It was slightly open. It had two doors. The doors were opened, tilted inward. I would say that the doors were about two feet up from the surface of the sidewalk. As I was walking along I don't remember exactly what happened. All I know is that the three of us were walking along and talking, and the next thing I knew Johanne was going in head-first."

The witness Betty Ann Peshak testified:

> "We were looking straight ahead. I noticed an open shaft or two hatch doors on the sidewalk. I don't remember where I was when I saw them. When I saw them, they were open. I would say we were about fifteen feet south of them. We were walking along normally and carrying on a conversation, when all of a sudden Johanne fell in. I don't know what happened. It happened so fast."

Plaintiff testified as follows:

> "I was walking along straight ahead with the other two girls, and when I got up there I caught my heel in the north part of the door, and I tried to regain my balance when I saw this hole down there. I spun around and Frances Land ser aned and I plunged right down into it."

The testimony of Marion Ross, a fourth eyewitness, who testified by deposition, was substantially the same as that of the girls.

There was no material conflict in the evidence. While the question of contributory negligence is ordinarily one of fact for the jury, when there is no conflict in the evidence and the court can clearly see that the injury was the result of the negligence of the party injured, it should not hesitate to instruct the jury to return a verdict for the defendant. Illinois Central R.R. Co. v. Oswald, 338 Ill. 270, 275. In the instant case there was no charge of willful or wanton conduct on the part of the defendants, and the plaintiff, therefore, had the burden of affirmatively showing that she was in the exercise of due care and caution for her own safety. Little v. Illinois Terminal R. Co., 320 Ill. App. 163.

The undisputed evidence establishes that the day was clear; that plaintiff's view was unobstructed; that the barrier which she approached extended two and one-half to three feet above the sidewalk; that her eyesight was good; that she was familiar with the street; that she was looking straight ahead. Yet she contends that she did not see the doors or the hatchway. No excuse whatsoever is offered for her failure to observe what was in clear sight. Failure to see what is clearly visible is not, under the authorities, such conduct as is compatible with due caution for one's own safety. Briske v. Village of Burrham, 379 Ill. 193; Dee v. City of Peru, 343 Ill. 36. The plaintiff here was required to make reasonable use of her faculties, and, under all the admitted facts and circumstances in this case, we must hold that her failure so to do constituted contributory negligence as a matter of law.

Plaintiff cites a number of cases on the proposition that in passing on the defendants' motions for directed verdict the court could only consider the evidence favorable to the plaintiff, and cites cases, in certain aspects analogous, where the question of contributory negligence was held to be one of fact. It is to be observed that while the general principles of law applicable in these cases are well established, their application to the particular situations differs with the varying facts and circumstances of each particular case. We have carefully searched the record in this case and find nothing which would bring it within the doctrine enunciated in the cases cited by plaintiff.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

Niemeyer, P.J., and Feinberg, J., concur.

45270

MARGRETTA A. ROTTMAYER, Appellee, v. SAMUEL ROTTMAYER, Appellant.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY.

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

On April 12, 1950, plaintiff filed a complaint for separate maintenance charging desertion. On May 1st the order here appealed from was entered against defendant, directing payment by defendant to plaintiff, as temporary alimony, the sum of $300 per month for maintenance of plaintiff and the minor child of the parties, and certain other payments, not to exceed $200 per month, for mortgage installments and maintenance and upkeep of the home belonging to both and occupied by plaintiff, and also the sum of $500 for temporary solicitor's fees.

Defendant contends (1) that the amounts allowed are arbitrary and unreasonable, and (2) that the order is void because entered in disregard of defendant's right to a preliminary hearing to ascertain the probability of defendant's proving charges set forth in a counterclaim for divorce.

The evidence shows that defendant is a member of a partnership of consulting engineers consisting of six members, sharing in the assets to the extent of one-seventh; that the partnership agreement provides that defendant be paid $100 per week drawing account without any further action of the partners, but that the distribution of additional income is subject to agreement.

Defendant's income tax return for the year of 1949 indicates his share of the profits of the partnership was $22,088.92; that of this amount he actually received $13,659.30 out of which he paid income taxes amounting to $4,116.74, leaving a balance of $9,542.56, from which certain business expenses were deducted. Defendant testified that the sum of $8,429.62 went into the reserve account of the partnership, which, according to the testimony of the senior partner, "is to tide us over in case of a depression and hard times. * * * It is for current expenses as well as any upset that might come over a period of extraordinary matters."

Defendant takes the position that his income for the purpose of determining the share which should be allotted to the wife should be based upon the amount of $100 a week, because, as he says, "there is absolutely no way for defendant to obtain more money per week than $100.00 from this partnership unless the arrangement presently in existence between the partners is changed, so that this defendant can meet the demands of plaintiff or comply with the order of the lower court." The undisputed evidence before us is that defendant received approximately $8,700 net from the partnership in 1949. No reason appears in the evidence why these partners may not declare a dividend at any time that they see fit. As a matter of fact, the partnership agreement provides that "after the payment of the drawing accounts and all expenses of operation, any net income then remaining shall be divided among the partners in the same proportion as they hold parts in the assets of the partnership * * *. Distribution of the

net income above described shall be made only if the cash therefor is on hand, and only if it can be made without impairment of the working capital of the partnership which is agreed to be the sum of $10,000.00." The partnership agreement is silent on what amount, if any, is to be set aside for "depression and hard times," and the only reference to the working capital in the written agreement is the item of $10,000 above. Samuel Lewis, one of the partners, testified, "From my own personal knowledge as director of that firm, Mr. Rottmayer cannot withdraw any money from that reserve fund." However, nothing in the partnership agreement seems to support this conclusion of the witness, and Lewis's statement at most means that the time when defendant might withdraw assets admittedly his was subject to partnership approval.

The trial court was entitled to conclude from the evidence before him that the amount set up by the partnership for reserve was subject to later distribution, representing a deferred dividend which could be distributed whenever the partners concluded that the emergency for which it was set up no longer existed. In any event, the wife should not be precluded from asserting her claim by virtue of a partnership agreement regulating the <u>time</u> of distribution of partnership assets. We are not disposed to interfere with the finding of the trial court on the question of defendant's income, and we do not think, under all the facts and circumstances, that the amounts fixed for alimony, maintenance and temporary solicitor's fees are unreasonable or arbitrary.

Defendant further contends that he was entitled to a preliminary hearing prior to allowance of temporary alimony, solicitor's fees or suit money, for the purpose of ascertaining whether it was probable defendant could prove charges set up in a counterclaim for divorce. Chapter 40, paragraph 16, of the Illinois Revised Statutes so provides in cases where the original suit is for divorce. It is not necessary for us to determine whether or not this section of the statute applies where the wife has commenced the proceedings by a complaint for separate maintenance, for the reason that no motion for such preliminary hearing was filed by defendant until after the court had ruled on the motion for temporary alimony and solicitor's fees. On April 28, 1950, at the beginning of the hearing defendant's attorney said, "I am also filing a counterclaim for divorce, and I am asking that any question relative to temporary support or temporary attorney's fees be postponed until the defendant has been granted a preliminary hearing in connection with his counterclaim for divorce." This statement was made to the court after the hearing was under way, and the court very properly ruled: "Inasmuch as we have proceeded, Mr. Mullaney, in a part of this morning, we will go as far as we can with this. If you interpose what you suggest now, we will then take up the question of what rights you have***."

Notwithstanding the fact that the defendant stated that he was filing a counterclaim for divorce, no such pleading was filed until after the hearing was completed and the court had indicated what his decision would be on the

question of temporary alimony and solicitor's fees. Defendant could have filed his counterclaim any time after the filing of the complaint, without leave of court, and, by reason of failure to do so until after the proceeding terminated, he may not now complain of the court's action.

The order of the Circuit Court of Cook County is affirmed.

Affirmed.

Niemeyer, P.J., and Feinberg, J. Concur.

45281

UNITED MANUFACTURING COMPANY, a corporation, Appellant, v. CITY OF CHICAGO, a Municipal Corporation, MARTIN H. KENNELLY, Mayor of the City of Chicago, JOHN C. PRENDERGAST, Commissioner of Police of the City of Chicago, LUDWIG D. SCHREIBER, City Clerk of the City of Chicago, and WILLIAM T. PRENDERGAST, City Collector of the City of Chicago, Appellees.	APPEAL FROM CIRCUIT COURT COOK COUNTY

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Plaintiff by its bill in equity sought a mandatory injunction directing the defendants to issue licenses for plaintiff's automatic amusement machines and restraining defendants from seizing or otherwise interfering with the operation and use of machines in places of public resort within the City of Chicago. From an order dismissing the suit for want of equity on the ground that plaintiff has an adequate remedy at law, plaintiff appeals.

Plaintiff, an Illinois corporation, is engaged in manufacturing and distributing automatic amusement machines, among which are the "Super Shuffle-Alley" and "Double Shuffle-Alley" machines. These consist of tables upon which a person who desires to, may, upon depositing a coin, play a game in which the object is to displace a number of small wooden pins, in the nature of a miniature bowling

game. In January of 1950 plaintiff applied for licenses for its machines and tendered the annual license fees. The City Collector rejected these applications on the grounds that the machines should not be licensed because they were bagatelles in violation of section 193-26 of the Municipal Code of the City of Chicago, and slot machines in violation of the Criminal Code of the State of Illinois and section 191-5 of the Municipal Code of the City of Chicago. Both before and after the refusal to license said machines plaintiff made distribution of a number of them in various places of public resort in the City of Chicago. The bill charges that the defendants threaten to arrest plaintiff and seize and destroy the machines. The bill further alleges that the machines are neither bagatelles nor slot machines within the meaning of any ordinance or statute; that the seizure and destruction of the machines and arrest of plaintiff would cause irreparable damage to plaintiff; and that plaintiff has no adequate remedy at law.

Defendants maintain that plaintiff has an adequate remedy at law; that mandamus will lie to compel action which is ministerial in character; that when mandamus is available a court of equity has no power to issue an injunction; that injunction and mandamus are not correlative remedies applicable to the same subject matter.

The identical question raised in this case has recently been before this court (Second Division) in the case of D. Gottlieb & Co., v. City of Chicago, et al.,

opinion No. 45188 filed October 25, 1950. In that case this court reviewed the authorities at length, holding that the remedy of mandamus was available to the plaintiff and that, where such remedy is available, a court of equity has no jurisdiction. Plaintiff admits that this case is controlling of the issues in the instant case, but insists that the result reached in the Gottlieb case was not well considered. We see no reason for receding from the conclusions reached in the Gottlieb case, the reasons for which were reviewed at length in the opinion, and accordingly the judgment order of the Circuit Court of Cook County is affirmed.

AFFIRMED.

Niemeyer, P. J., and Feinberg, J., concur.

APPELLATE COURT
STATE OF ILLINOIS
FOURTH DISTRICT

TERM NO. 50-0-5. AGENDA 5.

In the Matter of the Estate of Sophia M. Franke, Deceased,	
TILLIE BUESSER, Claimant, Petitioner,	Petition for Leave to Appeal from Order of Circuit Court of Madison County Granting a New Trial
vs.	
HARRY F. HEMPHILL, Administrator With the Will Annexed of the Estate of Sophia M. Franke, Deceased, Respondent.	

Bardens, J.

Petitioner, Tillie Buesser, filed a claim against the estate of Sophia M. Franke in the sum of $2,899.00 for care, nursing, and services allegedly rendered to the deceased for 223 days immediately prior to her death. The period of care extended from September 16, 1945, until April 27, 1946. Respondent is the Administrator with the Will Annexed of the Estate of Sophia M. Franke. After a trial in the Probate Court, an appeal was taken to the Circuit Court of Madison County. In the Circuit Court, the jury rendered a verdict for $2,899.00 in favor of the Petitioner, Tillie Buesser. Upon the Administrator's motion, the Circuit Court granted a new trial. We allowed an appeal from that order.

On September 16, 1945, Norman Franke brought his aunt, Sophia Franke, then suffering with cancer to the Petitioner's home. She remained there until her death. This constituted a period of 223 days. The Petitioner claims that Sophia M. Franke contracted to pay $13.00 a day while she was there, making the total claim $2,899.00.

To establish this contract, the Petitioner produced as a witness her son, Elmer Buesser. He testified that he heard a conversation in which the decedent agreed or promised to pay $13.00 a day for care and nursing. The Petitioner also produced testimony by a doctor that the reasonable and customary charges for care and practical nursing in the vicinity in

which they lived was $15.00 for a 24-hour day.

Tillie Buesser's corroborating evidence pertained to facts concerning the nature and extent of her care of the decedent in the Buesser home for this period. The Petitioner also introduced the Will of the deceased in evidence, showing that Norman Franke, a nephew raised in the home of the deceased woman, was her sole beneficiary. The Petitioner introduced further evidence that Norman Franke, on September 16, 1945, brought his aunt, Sophia Franke, to the Buesser home and let her out in front of the house without making any arrangements with anyone for her care.

Evidence introduced by the Administrator tended to show that when Sophia Franke was first taken to the Buesser home she was able to do many things for herself and required little care; that until January, 1946, she was not bedfast except for several occasions when it was necessary to "tap" her for a dropsical condition; and that she was not in need of continuous practical nursing services until the last few weeks of her life. The Administrator also showed that Jacob Buesser, husband of the Petitioner, had filed a claim against the estate for board and room furnished the deceased during all of the period covered by the claim of the Petitioner. This claim was allowed and paid in the sum of $440.00.

The record of the lower court does not indicate any reasons for granting a new trial, and we are not advised as to whether this ruling was based upon questions of law or questions of fact. The oral arguments before our court, however, were concerned chiefly with factual questions and the propriety of counsels' arguments to the jury. We assume, therefore, that the trial court did base its decision upon these questions of fact.

It is a settled and familiar rule that the trial court exercises broad discretion in granting a motion for a new trial, particularly where questions of fact are involved. Loucks v. Pierce, 341 Ill. App. 253. This is true because a trial court has the opportunity to observe many things that do not appear in a printed record. Gavin v. Keter, 278 Ill. App. 308. The trial

court also has an opportunity to observe the effect of testimony and the remarks and arguments of counsel upon the jury which a reviewing court does not have.

The attention of the jury was called to the fact that, although Norman Franke was the sole beneficiary under the Will of the deceased and had been brought up in her home, he cared so little for his aunt that he took her to the Buesser home and left her there to walk from his car to the home without any provision for her care. This line of argument would make it obvious to the jury that, by allowing the Petitioner as large a claim as possible, it could cut down the size of the estate inherited by the "undeserving" nephew. Such appeal to passion and prejudice was based upon matter immaterial to the merits of Petitioner's claim and of itself would be sufficient cause for the trial judge to exercise his discretion and grant a new trial.

The Petitioner points out that appellate courts have been reluctant to allow or sustain a motion for a new trial unless there is the probability of a different result. It appears to us, however, that in this case there well might be a different result because the testimony concerning the contract for care of the decedent came from an interested witness, the son of the claimant. Regarding interested witnesses, our Supreme Court, in as recent a case as Monninger v. Koob, 405 Ill. 417, 423, says:

> "It is an axiom that Courts lend a very unwilling ear to statements by interested persons about what dead men have said....."

The jury was at liberty to disbelieve the testimony of Elmer Buesser as an interested person. If it believed that no contract for a definite sum was made, the Petitioner's claim would be allowed on a Quantum Meruit basis. Under these circumstances, a verdict for a smaller amount might be reached as it was in the Probate Court where the jury awarded the claimant $1500.00. Without objectionable argument interjected, a different result is, at least, probable upon re-trial.

Order granting a new trial is affirmed.

Scheineman, P.J., and Culbertson, J., concur.
(Publish abstract only)

APPELLATE COURT
STATE OF ILLINOIS
FOURTH DISTRICT

October Term, A. D. 1950

Term No. 50-0-8. Agenda No. 12

ELLIS CROACH, Plaintiff in Error	)	Error to the
v.	)	County Court of
THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error	)	Massac County.

Bardens, J.

The Plaintiff in Error was charged with "Palpable omission of duty by a municipal officer" by an indictment returned in the Circuit Court of Massac County. The indictment was certified to the County Court of said county for process and trial. Upon the trial of Plaintiff in Error before a jury, the jury returned a verdict of guilty and assessed a fine aginst him in the sum of five hundred dollars. Judgment of the Court on the verdict was entered on April 8, 1949, assessing a fine against Plaintiff in Error of five hundred dollars and costs of the proceeding. Plaintiff in Error brings this Writ of Error to this Court for review of such judgment.

One of the errors assigned by Plaintiff in Error is that he was not arraigned nor did he enter a plea to the indictment. We have examined the abstract and the record and find that there does not appear of record any arraignment or plea. Under these circumstances, there is nothing we can do except to reverse and remand the cause. (The People v. Bain, 358 Ill. 177; The People v. Kennedy, 303 Ill. 423.)

Judgment reversed and cause remanded.

Scheineman, P. J., and Culbertson, J., concur.

Publish abstract only.

APPELLATE COURT
STATE OF ILLINOIS
FOURTH DISTRICT

October Term, A. D., 1949

Term No. 4901 Agenda No. 1

ELLIS CROACH, Plaintiff in Error,	)	Error to the
-v-	)	County Court of
THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error.	)	Massac County.

BARDENS, P. J.

The Plaintiff in Error was charged with "Palpable omission of duty by a municipal officer" by an indictment returned in the Circuit Court of Massac County. The indictment was certified to the County Court of said county for process and trial. Upon the trial of Plaintiff in Error before a jury, the jury returned a verdict of guilty and assessed a fine against him in the sum of five hundred dollars. Judgment of the Court on the verdict was entered on April 8, 1949; fining the Plaintiff in Error five hundred dollars and costs of the proceeding. Plaintiff in Error brings this Writ of Error to this Court for review of such judgment. Defendant in Error has filed no brief in the cause.

One of the errors assigned by Plaintiff in Error is that he was not arraigned nor did he enter a plea to the indictment. We have examined the abstract and the record and find that there does not appear of record any arraignment or plea. Under these circumstances, there is nothing we can do except to reverse and remand the cause.

It has been the holding of the upper courts in this state for many years that a plea is mandatory before the trial court has authority to pronounce judgment against the defendant in

a criminal case, regardless of whether the charge is a misdemeanor or felony. (See The People -v- Bain, 358 Ill. 177; The People -v- Kennedy, 303 Ill. 425.)

For the reason assigned the judgment of the trial court is reversed and the cause remanded.

Judgment reversed and cause remanded.

Justices Scheineman and Culbertson Concur.

(Publish abstract only)

45168

JOSEPH PIEKARCZYK, Appellant,	)	APPEAL FROM
v.	)	SUPERIOR COURT
JOHN GIBAS, Appellee.	)	COOK COUNTY.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On July 7, 1949, Joseph Piekarczyk filed a complaint at law in the Superior Court of Cook County against John Gibas charging malicious prosecution, and asking damages of $10,000. On August 11, 1949, an alias summons was issued and placed in the hands of the Sheriff of that county. This summons required the defendant to answer or otherwise make his appearance on Monday, September 5, 1949, provided the writ should be served not less than 20 days before that date. The summons stated that should the writ be served upon defendant less than 20 days before September 5, 1949, "and is served 20 days before Monday, September 19, 1949," he should answer or otherwise make his appearance on the last mentioned date. The summons was personally served on defendant on August 15, 1949, and the return of the Sheriff so certified. Between August 15, 1949 and September 5, 1949 is 21 days. Defendant's appearance by answer or otherwise was due on September 5, 1949. Because that day was a holiday, the time within which defendant could appear was extended to and including Tuesday, September 6, 1949, in accordance with Par. 1.11, Ch. 131, Ill. Rev. Stat. 1949, and also in accordance with the order entered by the Executive

Committee of the judges of the Superior Court.

Defendant did not appear until September 21, 1949, when, without leave of court, he filed an appearance and answer. On September 22, 1949, an order of default was entered against him and the complaint was taken as confessed. An order was entered on the same day setting the cause "for hearing as a default for October 7, 1949." On that day plaintiff appeared, proved up damages and the court entered a finding and judgment against the defendant for $2,000. On November 23, 1949, a verified petition was filed by the attorney for defendant, stating that defendant filed his appearance and answer on September 21, 1949, and that he "thereafter had never received any notice of any proceedings or hearing in this matter, nor was he ever served with any notice of a hearing herein"; that he is now "informed that a judgment against his client" was entered on October 7, 1949; and that the defendant has a good and meritorious defense and is entitled to a hearing thereon. He prayed that the judgment be vacated and that "the matter be set for a hearing." On December 9, 1949, the court vacated the judgment of October 7, 1949, and set the cause for trial. No evidence was heard. The report of proceedings shows that plaintiff, by his attorney, opposed the motion to vacate. Plaintiff, appealing, asks that the order of December 9, 1949, vacating the judgment, be reversed and that the judgment of October 7, 1949, be restored.

Defendant asserts that the order of default entered September 22, 1949, and the default judgment entered

on October 7, 1949, were null and void because he had filed his appearance and answer on September 21, 1949. We cannot agree with defendant. Supreme Court Rule 4 (4) provides as to the form and contents of the summons. It states that the defendant must file his answer or otherwise make his appearance on or before the first day mentioned in the summons provided the writ shall be served not less than 20 days before that date. Supreme Court Rule 8 (1) provides that the defendant shall appear on or before the first return day named in the summons provided the summons shall be served upon him not less than 20 days prior to that date. Secs. 1 and 2 of Rule 11 of the Superior Court provide:

> "Sec. 1. Where process has been duly served to a given return day and the defendant shall fail to appear by filing a motion or pleading, as required by law, he shall be considered in default, but no motion to have such default entered of record will be entertained before the opening of court on Wednesday, the second day after such return day.
>
> "Sec. 2. The filing in the Clerk's office of a motion for extension of time to plead shall not of itself stop default. Every such motion must be made in open court prior to expiration of the time limited for appearance."

In the instant case defendant filed an appearance and answer more than two weeks late without leave of court. A defendant cannot ignore the rules and file an appearance and answer at his pleasure. Winning v. Winning, 366 Ill. 57; Travelers Insurance Co. v. Wagner, 279 Ill. App. 13, 15. Defendant maintains that under Sec. 72 of the Civil Practice Act the court had the right to vacate the judgment for an error of fact which, if known to the court, would have precluded the entry of the judgment. Defendant considers that the error of fact not called to the attention of the court was that the

appearance and answer had been filed on September 21, 1949, without leave of court. Rule 8 of the Superior Court provides that the clerk shall keep a register in which shall be noted with respect to each cause the date of filing of each paper therein, together with a description of the paper as brief as is consistent with its proper identification. We are of the opinion that the defendant cannot obtain relief under the provisions of Sec. 72 of the Civil Practice Act, which provides that the writ of error coram nobis is abolished and all errors in fact, committed in the proceedings of any court of record, and which, by the common law, could have been corrected by that writ, may be corrected by the court in which the error was committed, upon motion in writing, made at any time within five years after the rendition of final judgment upon reasonable notice.

In Jerome v. 5019-21 Quincy Street Building Corp., 385 Ill. 524, wherein judgment by default was entered, defendant's motion questioned the order of default entered February 28, 1941, and the judgment of March 3, 1941. The basis of the objection was that 20 days had not intervened between the day the summons was served, February 1, 1941, and the third Monday of February, February 17, 1941, and that as a result it had until the next return day, which was the first Monday of March within which to file an answer. The motion, as in the instant case, was not filed until more than 30 days after the judgment was entered and therefore any relief defendant might have obtained had it made application within 30 days under Sec. 50 of the Civil Practice Act,

was not available to it. The Supreme Court treated the motion as having been filed to obtain relief under Sec. 72 of the Civil Practice Act, holding that the Circuit Court erred in vacating the judgment and said (527):

"It will be observed that the scope of inquiry on such a motion is limited to errors in fact, not appearing on the face of the record, committed in the proceeding, which errors in fact could have been inquired into by the common-law writ of error coram nobis. In illustrating the questions of fact that were subject to inquiry under such a motion, this court has in various cases referred to matters such as disability of the parties to sue or defend, the failure of the clerk to file a plea or answer, and where a defendant who was not negligent but was, through fraud, duress or excusable mistake, prevented from interposing a valid defense existing in the facts of the case. Jacobson v. Ashkinaze, 337 Ill. 141; Marabia v. Mary Thompson Hospital, 309 Ill. 147; Chapman v. North American Life Ins. Co., 292 Ill. 179.

"The facts upon which the alleged error in this case was committed were a matter of record and before the court when the judgment was entered. The entering of the orders of default and judgment had the legal effect of a holding by the court that service had been obtained a sufficient length of time to meet the requirements of Rule 4 of this court and to authorize the entering of an order of default and judgment without further delay. By the motion, defendant asked the court to review its former ruling in this regard and to hold the orders of default and judgment were prematurely entered. The question thus presented involved a question of law which required a construction of Rule 4 and its application to the admitted facts. Such matters are not within the field of inquiry allowable under a motion filed under section 72 (par. 196) of the Civil Practice Act. The rule is well established that such a motion is not available to review questions of fact which arise upon the pleadings or to correct errors of the court upon questions of law. People v. Crooks, 326 Ill. 266; Village of Downers Grove v. Glos, 316 Ill. 563; Marabia v. Mary Thompson Hospital, 309 Ill. 147."

Defendant urges that he had until Wednesday, September 21, 1949, to file his appearance and answer because the first legal return day was Monday, September 19, 1949. Defendant was served with the summons on August 15, 1949. The 21st day, Monday, September 5, 1949, was Labor Day, a legal holiday.

Par. 1.11, Ch. 131, Ill. Rev. Stat. 1949, provides that the time within which any Act provided by law is to be done shall be computed by excluding the first day and including the last, unless the last day is Sunday or is a holiday as defined or fixed in any statute now or hereafter in force in this State, and then it shall also be excluded. If the day succeeding such Sunday or holiday is also a holiday or a Sunday, then such succeeding day shall also be excluded. Par. 18, Ch. 98, Ill. Rev. Stat. 1949, names the first Monday in September known as Labor Day as a legal holiday. The summons was served on defendant "not less than 20 days" before September 5, 1949. The fact that the return day was a legal holiday did not have the effect of making the return day September 19, 1949. Under the statute the defendant had the right to file his appearance and answer the day following the holiday, or September 6, 1949. Under Secs. 1 and 2 of Rule 11 of the Superior Court the defendant was required to appear by filing a motion or pleading by September 5, 1949. That day being a holiday he had a right to appear the following day. It will be observed that under the rule a defendant who fails to appear "shall be considered in default," but no motion to have such default entered will be entertained before the opening of court on Wednesday, the second day after the return day; that the filing in the Clerk's office of a motion for extension of time to plead shall not of itself stop default; and that every such motion must be made in open court prior

to the extension of the time limited for appearance. It is obvious that the mere filing of an appearance or an answer, after the return date, cannot of itself "stop default."

The petition to vacate contains no facts sufficient to give the court jurisdiction to vacate the judgment. It does not give any reason for the failure of defendant to file an appearance and answer when due, nor does it give any reason why an appearance and answer were filed on September 21, 1949, without leave of court. It also fails to state why the defendant waited until November 23, 1949, before filing his motion to vacate. No fraud, duress or excusable mistake is alleged. It does not set forth any ground for vacating the judgment under Sec. 72 of the Civil Practice Act. Defendant states that any inadequacy in the petition was waived when plaintiff failed to file a pleading objecting to the sufficiency thereof. The record shows that plaintiff opposed the motion to vacate the judgment. The facts well pleaded in the petition cannot be, and are not, questioned by the plaintiff. The petition presents a question of law. The facts are not in dispute. We are satisfied that the court erred in vacating the judgment. Therefore, the order of the Superior Court of Cook County of December 9, 1949, vacating the judgment, is reversed and the cause is remanded with directions to restore the judgment entered October 7, 1949.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

KILEY AND LEWE, JJ. CONCUR.

45210

PEOPLE OF THE STATE OF ILLINOIS,	)	WRIT OF ERROR TO
Defendant in Error,	)	
	)	MUNICIPAL COURT
v.	)	
	)	
GEORGE PETROPULOS,	)	OF CHICAGO.
	)	
Plaintiff in Error.	)	

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

An information filed in the Municipal Court of Chicago charged that on June 22, 1949, George Petropulos assaulted and "beat" John N. Rogers in the City of Chicago. Following a plea of not guilty and a trial by jury, a verdict was returned finding the defendant guilty in manner and form as charged in the information, and assessing a fine of $100. A motion for a new trial was overruled and judgment was entered on the verdict. Defendant prosecutes a writ of error.

Although the information alleged that the offense was committed on June 22, 1949, all of the testimony fixed the time as between 9:30 p.m. and 10:00 p.m. on June 21, 1949. John Rogers, the prosecuting witness, and Herbert Anderson, a disinterested witness, testified for the People, while Larry Brotsch, a 15 year old boy, supported the testimony of the defendant. In the view we take of the case, it is unnecessary to detail the testimony. Rogers asserted that defendant was the aggressor and the latter maintained that Rogers was the aggressor. The defendant contended that he acted in necessary self-defense. The burden was on the People to prove the defendant guilty beyond a reasonable doubt. The evidence was conflicting.

The court instructed the jury that "if a person is assaulted in such a way as to produce in the mind of a reasonable person a belief that he is in actual danger of suffering bodily harm, he will be justified in defending himself, although the danger be not real, but only apparent." The attorney for the defendant stated to the court that he tendered an instruction "stating that a defendant has a right to stand his ground and meet force with force when in a place where he had a right to be." The court (in the presence of the jury) rejoined: "I don't think the evidence shows any apparent great danger. I don't think that is the law but I will give it to satisfy counsel, because he has requested it." Thereupon the court instructed the jury that "where a person is in a place where he has a lawful right to be, and is put in apparent danger of great bodily harm, he need not attempt to escape, but may lawfully stand his ground and meet force with force, if necessary or apparently necessary to prevent great bodily harm." Expressions of opinion by the trial judge are liable to have great weight with the jury, and therefore especial care should be observed that nothing be said by him to the prejudice of either party. Lycan v. People, 107 Ill. 423; People v. Krejewski, 332 Ill. 120. The trial judge expressed the view that the evidence did not show "any apparent great danger" and he also said that although he did not believe that the tendered instruction stated the law, he would give it "to satisfy counsel." These remarks were likely to be misunderstood by the jury. We find that the statement of the court in the presence of the jury

was prejudicial to the defendant. Because of the remarks of the trial judge, we are of the opinion that defendant should have a new trial.

Defendant also asserts that error was committed when the Assistant State's Attorney argued to the jury that defendant's attorney had an unusual interest in the case and that his "fee maybe depends" on securing the acquittal of the defendant. Manifestly, this was an improper argument. Defendant's attorney was not on trial. It is unnecessary to say whether the remark constitutes reversible error.

Because of the prejudicial remark of the trial judge, the judgment is reversed and the cause remanded for further proceedings not inconsistent with the views expressed.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

KILEY AND LEWE, JJ. CONCUR.

44997

ELIZABETH WOOD, Appellant, v. CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY OF CHICAGO, etc., et al., Appellees.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a suit seeking the construction and termination of a testamentary trust. Plaintiff is one of three children of the testatrix. She has appealed from a decree which, among other things, continued the trust. The cross-appellant Brown is plaintiff's nephew. He has appealed from the part of the decree adverse to his claim of former adjudication.

Augusta R. Papke made her will December 10, 1925. She died June 25, 1928. She left three children, plaintiff Elizabeth Wood, defendant Augustus Rawson Wood and Ellery Lovejoy Wood, as her only heirs-at-law. They were the named beneficiaries in the part of the Augusta Papke trust pertinent to this suit. At the time of the trial in 1947 Elizabeth was about forty-eight years old, Augustus about forty-five and Ellery, had he lived, would have been about fifty-three. After the death of testatrix the income from the trust estate was paid by the trustee to the three children, one-tenth to Ellery, four-tenths to Elizabeth and five-tenths to Augustus. This was in accordance with the proportions set in the trust provisions. Ellery died testate June 20, 1942.

He left surviving him his former wife, R. Jo Thorpe, from whom he was divorced in 1940, and his two sons, Phillip and William. These three were named legatees and devisees in Ellery's will. After Ellery's death the trustee divided Ellery's share of the income equally between Elizabeth and Augustus so that the trust income was thereafter paid to Elizabeth, forty-five one hundredths, and to Augustus, fifty-five one hundredths. This was done, presumably, under the trustee's construction of the trust provisions. The cross-appellant was named as defendant in this suit and, in pleading to plaintiff's complaint, claimed that her action was barred by a construction of the Papke trust in a prior suit. After this claim was made, the trustee ceased making the income payments to Elizabeth and Augustus.

The following persons were named defendants by plaintiff: the divorced wife and children of Ellery Wood; Augustus Wood and his minor children; Benedek, as administrator with will annexed of the estate of Ellery Wood; Lorin Andrews Rawson, brother of testatrix; Unknown Owners; and the trustee-Bank. The chancellor appointed a guardian ad litem for the minors and a chancery trustee for persons not in being. Rawson and the Unknown Owners were defaulted. The only appellants are plaintiff and Brown, who was sued as William Ellery Wood. They and the trustee-Bank are the only parties who have appeared in this Court.

Brown claimed wrongful payments by the Bank and sought an accounting. The Bank voluntarily submitted its account. The chancellor approved the account and affirmed

the trustee's actions. No point is made of the chancellor's actions in this respect.

The issues made by the pleadings in the trial court were: Whether there has been a prior adjudication of the subject matter of the present action; whether the trust was void for want of a time of termination; and whether after Ellery's death the plaintiff and Augustus were vested with all the interest in the trust estate and entitled to termination of the trust. The chancellor decreed that there was no prior adjudication so as to bar this action; that the time of termination was the death of the last survivor of the three children of testatrix; that plaintiff and Augustus Wood were not entitled to termination of the trust; and that the trust should continue until the death of the survivor of Elizabeth and Augustus. He found that the trust estate had a value of about $30,000.

The trust is established in Article Three of the Augusta Papke will. The pertinent parts of that Article are:

> Paragraph 1. * * * I give, devise and bequeath all said rest, residue and remainder of my estate to * * * Trustee, in trust, to collect and pay over the net income thereof to my three children, Ellery Lovejoy Wood, Elizabeth MacLean and Augustus Rawson Wood, during their life times, (in the proportions hereinafter designated in Paragraph 2 hereof) * * *
>
> Paragraph 2. In providing for my three children, (after the death of my mother as aforesaid), I give, devise and bequeath my estate in trust for them, in the following proportions;
>
> Ellery Lovejoy Wood--one-tenth;
> Elizabeth MacLean--four-tenths;
> Augustus Rawson Wood--five-tenths.
>
> I made this differentiation or division because my son, Ellery, is not only indebted to me but because he has proved himself unworthy. My other two said children are also indebted to me, and my daughter to a greater amount than my son, Augustus.

> Paragraph 3. In the event of the death of * * * Ellery, prior to the death of both or either of my other two said children, his portion of said trust estate shall be equally divided between them, or all given to the survivor, as the case may be, and become part of the corpus of his, her or their portions; and in the event of the death, without issue then living, of my daughter, Elizabeth, or of my son, Augustus, before the death of my son, Ellery, the share of the one so dying is hereby directed to be given to the other, and shall become a part of the corpus of the others trust estate. In case, however, that either of said Elizabeth or said Augustus shall die leaving issue, his or her share is hereby directed to be given to such issue.
>
> Paragraph 4. In case of the death, without issue of both my daughter, Elizabeth, and my son, Augustus, prior to the death of my son Ellery, I direct that their shares of said trust estate shall be divided equally among, and paid and transferred to my son, Ellery, and my said brothers William and Lorin, or the survivor of either of them, share and share alike.

In disposing of the issues the chancellor decided that in paragraph 2 the testatrix intended a division of the income and that in paragraph 3 the gifts over were of the proportionate shares of the income. He also decided that on the death of the survivor of Elizabeth and Augustus, the corpus should be given to such of their respective issue as survived them in the same proportions as they were at their deaths

entitled to share in the income.

We see no merit to cross-appellant's contention of former adjudication. He has shown no reason, based on the record or otherwise, why the decision on this issue is erroneous. The basis of his claim is a mere erroneous finding in a consent decree, in a prior suit, in which construction of the Papke will was not sought and was not in issue. That this finding was erroneous is obvious. It found that the will provided for payment of the income in equal parts to the children. The will provides for unequal payments of income and the reason for the inequality is stated. The Bank, after the decree in the prior suit, paid out money for several years in disregard of the finding and without protest from Brown. He relies upon Paine v. Doughty, 251 Ill. 396, and American Tar Products Co. v. Bradner Smith & Co., 238 Ill. App. 151. The instant suit is not an attempt to vary the terms of a consent decree as in the Paine case, nor the second construction of the same will as in the Tar Products case.

We think the chancellor correctly decided against the plaintiff's claim that the trust was void for

indefinits duration. There is no express termination date in the Papke will nor any express reference to termination of the trust. There is no postponement of distribution until the "trustees in their discretion might deem best or expedient" as in Van Epps v. Arbuckle, 332 Ill. 551; nor until two parties agree as to price as in Fox v. Fox, 250 Ill. 384; nor is power to distribute dependent on directions of settlor as in Gallagher v. Drovers Tr. & Sav. Bk., 404 Ill. 410. There is no devise to the trustee for benefit of persons and their descendants in perpetuity as in City Nat'l. Bank and Trust Co. v. White, 337 Ill. 442.

The intention of the testatrix as to termination of the trust must be determined from the entire will. Kohtz v. Eldred, 208 Ill. 60. In view of our construction hereinafter we conclude that the testatrix intended that the trust should cease upon the death of the last survivor of her children. While this is not a specific "date", it is a definite time within the meaning of the cases referred to. The trust terminates with the cessation of the active duties of the trustee (Kohtz v. Eldred) and in the instant case no authority is given the trustee beyond the death of the last

survivor of the three children. The chancellor correctly decided that the trust should be continued until the death of plaintiff or Augustus whichever survives the other. The express duties of the trustee carry no power beyond the termination of the income life estates. Wagner v. Wagner, 244 Ill. 101.

It is our opinion that the testatrix in paragraph 2 of Article Three devised the remainder to her children in the proportions stated. We have reached this conclusion from a consideration of all the trust provisions. Stagg v. Phenix, 401 Ill. 134; In re Estate of Close, 330 Ill. App. 231. We presume the testatrix intended to dispose of her entire estate. Hawkins v. Bohling, 168 Ill. 214. In paragraph 1 Augusta Papke devised the residue of her estate in trust to provide the income for her children. There was no necessity to make the devise in paragraph 2 in order to establish the portions of income. This could have been done in paragraph 1. That she stated the proportions in paragraph 2 solely in order to explain their inequalities is not convincing and does not explain the devise in that paragraph. The word "income" is not used in the paragraph. The devise is of "my estate". She did not expressly devise the remainder in paragraph 2 but her estate had been devised in paragraph 1 to provide the income. This construction results in a devise of the remainder to the same persons who were given the life incomes. Under the trust provisions, as construed by us, neither Elizabeth nor Augustus will enjoy possession

of their share of the remainder because the income is payable until the survivor dies. The issue of either or both, under the last sentence of paragraph 3, will enjoy the fee in possession. It is said to be neither inconsistent nor absurd for a testator to give a life tenant an interest in fee in the remainder. Hartwick v. Heberling, 364 Ill. 523.

It is true that the devise is given "in trust for them". It is contended that the word "for" relates the words to the gift of the income made in paragraph 1. The word "for" is usable in the sense of a gift, e.g., "this is for you" or "the trustee will hold this for you", implying that "you" in each case is the owner. Furthermore, to construe this paragraph as a devise of income or as merely a division of the income would be to consider the words of the devise as repetitious and surplusage. The devise for income was made in paragraph 1. Our construction of paragraph 2 gives an orderly development to the disposition of the estate: The residue entrusted in paragraph 1 to provide income, the remainder disposed of in paragraph 2. We agree with the trustee that this conclusion results in an intestacy of Ellery's share of income. There is no provision in the first clause of paragraph 3 for disposition of his share of income in event of his death before either or both of the other children. Our conclusion will also result in the intestacy of the income share of either Elizabeth or Augustus whichever dies first.

We think that a close reading of paragraph 3 shows that the second sentence is connected to the thought in the

first sentence by the words which begin the second sentence, "In case, however * * *". Even in a will as inartfully drawn as this is we cannot believe the sentence can be reasonably construed as separated from the subject matter of the first sentence. Its location, words and content prevent such a construction. The sentence refers to the contingency of the death of either Elizabeth or Augustus with issue prior to the death of Ellery. Because Ellery is dead, the death of either or both children before his death, either with or without issue, cannot occur. Practically, the result of our construction will be that under the first clause of the first sentence of paragraph 3 there is a gift over to Elizabeth and Augustus in equal shares of the remainder interest of Ellery. The provisions of paragraph 3 confirm our construction of paragraph 2. Were paragraph 2 construed as dealing with income the phrase "the corpus of" would have to be rejected. This cannot be done where a reasonable construction can be made without disregarding words used by the testatrix.

Intestacies are not favored by the law (Hawkins v. Bohling, 168 Ill. 214) and should be avoided where a reasonable construction would warrant the avoidance. As the trustee points out, however, there will be intestacy under either construction of paragraphs 2 and 3. Plaintiff does not concede that point. She argues that there is no intestacy of Ellery's share of income under the construction we have made. She contends, without authority, that Ellery's share of income passed to her and Augustus "automatically" with his share of the remainder. The law is otherwise. Foss v. State B. &

T. Co., 343 Ill. 94. There is no merit in her contention. It follows that the chancellor correctly decided the issue whether plaintiff and Augustus were entitled to termination. There was no merger of estates in them. They do not hold all interest in the estate. The estate of Ellery has an interest in the intestate share of income.

We need consider no other points made. It would be inconvenient in this case and, we think, an inefficient disposition of it, to reverse the decree in part and affirm it in part. The decree is reversed and cause remanded with directions to chancellor to enter a decree in conformity with the views expressed herein.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

BURKE, P.J. AND LEWE, J., CONCUR.

45227

GALE L. MARCUS, Appellee,	)	APPEAL FROM
v.	)	MUNICIPAL COURT
MARY GLASGOW, Appellant.	)	OF CHICAGO.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a suit for recovery of $250.00 attorney's fees. Defendant demanded a jury trial but the trial court, on plaintiff's motion, entered a summary judgment for plaintiff. Defendant has appealed.

The statement of claim alleged an oral contract between the parties July 21, 1949, under which plaintiff, an attorney, was employed to obtain a mortgage loan of $5,700; that his fee was to be $250.00; that thereafter, on July 28th, defendant signed an application for the loan "and agreed to pay plaintiff" the $250.00 fee; that on August 3, 1949, plaintiff obtained a commitment according to the terms of the application, notified defendant accordingly and told her he was ready to complete the deal; and that she refused to go ahead and refused to pay the fee.

Defendant's pleading denied the oral agreement and admitted signing the application; stated that she had agreed to pay plaintiff the fee contingent upon his getting a loan commitment and performing all legal services for the completion of the loan; stated that shortly after making the application and before any commitment, she advised plaintiff not to proceed; and denied plaintiff had obtained a commitment.

Plaintiff's affidavit in support of the motion for summary judgment reasserted the oral agreement of July 21, 1949, and stated that before July 28th he advised defendant that he had a loan commitment and requested that she make a formal application; stated that the ~~xxxxxxxx~~ oral agreement was reduced to writing on the face of the application; that on August 3, 1949, he had written confirmation of the commitment and that not until August 12th was he asked to cease his representation of defendant; and that upon receipt of that request he told her he had completed the task he was employed to do and stood ready to perform whatever further incidental work was required.

Defendant's counter-affidavit, denies the oral agreement, admits being in plaintiff's office July 28th in response to his call and executing the application; states that plaintiff advised her she was free to change her mind about the loan without charge; and denied she was advised August 3rd of the written loan commitment or having any knowledge of such commitment.

The question is whether the affidavits of the parties present a material triable issue of fact.

Attached to the plaintiff's pleadings is a copy of the application for the loan. The application is made to the Mortgage Corporation. It authorized negotiation of the $5,700 eight year loan at six per cent interest. In it the defendant assumed eight numbered, printed undertakings, the first of which was to pay the sum of $342.00 to the Corporation for its services. In the blank space opposite

number 9 there is typewritten the following: "In addition to above commission, the undersigned hereby agrees to pay Two Hundred Fifty Dollars ($250.00) as and for attorney's fees to Gale L. Marcus." Also attached to plaintiff's affidavit is a copy of a letter purporting to have been written by the Mortgage Corporation to plaintiff advising him of the commitment on the terms of the application.

The parties agree that if there is a complete, unambiguous contract shown by plaintiff's affidavit and exhibits, conversations and statements as to the terms of the contract would not be admissible in a trial of plaintiff's suit. Defendant disputes plaintiff's contention that the application is a complete, unambiguous contract of his employment for which she was to pay a $250.00 fee.

It will be noted that in both the statement of claim and in his affidavit plaintiff alleged an oral agreement. In the affidavit he states that this agreement was reduced to writing in the application. Plaintiff was not a formal party to the application. We need not decide whether defendant's undertaking therein was an agreement with plaintiff or with the Mortgage Corporation or a mere recital of the previous oral agreement. It is enough that we think it is not a complete agreement. It does not state whether they are to be paid in connection with the loan or for what services the fees are to be paid. This conclusion is borne out by the statements in plaintiff's pleadings and affidavit about his readiness to do further incidental work, etc.

The language relied on does not say when defendant is to pay the fee. If the fees were not to be paid until the loan was offered by the Mortgage Corporation to defendant, there is no allegation or statement from which we can infer that defendant's obligation to pay had come into being.

We think that the language in the application relied on by plaintiff does not constitute a complete agreement between the parties; that if plaintiff is to recover on a contract, from defendant, it must be upon the alleged oral agreement of July 21, 1949, or on that and the typewritten undertaking in the application form. In either event defendant's testimony of the oral agreement would be relevant and admissible. The plaintiff's affidavit and defendant's counter-affidavit present a triable issue of fact with respect to the alleged oral agreement. Defendant is entitled to have a jury try that issue.

We need consider no other points made. The judgment is reversed and the cause remanded for further proceedings not inconsistent herewith.

JUDGMENT REVERSED AND CAUSE
REMANDED FOR FURTHER PROCEEDINGS.

BURKE, P.J. AND LEWE, J., CONCUR.

45171

RICHARD PRATT, Appellant,	)	APPEAL FROM
v.	)	CIRCUIT COURT
KATHLEEN PRATT, Appellee.	)	COOK COUNTY.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from orders vacating a default divorce decree and dismissing the cause for want of equity.

October 6, 1949 plaintiff filed a complaint for divorce alleging that defendant was guilty of extreme and repeated cruelty and that there was born of the marriage a child, Karen Pratt, who at the time of the filing of the complaint was one year old. October 12, 1949 defendant was served with process. No answer or appearance having been filed by defendant an order of default was entered. The cause was heard on November 23, 1949. December 1, 1949 a decree of divorce was granted plaintiff, custody of the child was awarded to defendant and plaintiff was directed to pay defendant the sum of eight dollars weekly for the support and maintenance of the child.

December 20, 1949 a petition was filed by James J. O'Shea, Jr., brother of the defendant, alleging that from December 26, 1948 to January 30, 1949 defendant was a patient in a sanitarium in Chicago; that from February 1, 1949 until the middle of June 1949, defendant and her husband lived and cohabited as husband and wife in the city of Chicago; that from June 15, 1949 until July 10, 1949 defendant and her child resided at the home of her father in Wisconsin

where she was visited by plaintiff; that on or about July 10, 1949 she returned with her husband to Chicago; that in the latter part of October 1949 defendant was again placed in a sanitarium and remained there until November 23, 1949 when she returned to her father's home in Wisconsin where she remained until December 7, 1949. December 8, 1949 defendant returned to Chicago and was immediately taken to the psychopathic hospital for observation where she remained until December 15, 1949 when, after a court hearing, she was committed to the Elgin State Hospital.

The petition further alleges on information and belief that plaintiff and one Lucille Taylor, who appeared as a witness to the alleged acts of cruelty in the divorce proceeding, "plan to be married and to leave this court's jurisdiction, and plaintiff will do so unless restrained." The petition concludes with a prayer asking that the divorce decree be vacated, for the appointment of a guardian ad litem for defendant and the minor child, for an order directing the plaintiff and his witnesses to appear in court for a hearing of the charges set forth in the divorce complaint and for general relief.

December 20, 1949 the trial court issued a writ of ne exeat, vacated the divorce decree, appointed a guardian ad litem for defendant and the minor child, and set the cause for hearing on December 29, 1949. On the latter day the court dismissed the complaint. Plaintiff appealed from the orders of December 20th and December 29th.

Plaintiff contends that the order of December 20, 1949 is invalid for the reason that the petition is insufficient in law and that it was entered without notice to plaintiff or his attorney. Under the provisions of chapter 50(7) of the Civil Practice Act any decree may be vacated within thirty days after rendition upon good cause shown by affidavit. Independently of any statute all courts of record have inherent power to set aside judgments during the term at which they were entered. (Department of Public Works v. Legg, 374 Ill. 306.)

In ordinary actions the controversy is between the parties of record but in a divorce suit the State is a third party and the court represents the interests of the State. As a rule the State does not appear by counsel and consequently does not plead. The court may, to satisfy its conscience, of its own motion investigate facts not contested by pleadings. In Johnson v. Johnson, 381 Ill. 362, at page 371, in passing on this question the court said: "The limit of the right of the public to be protected while thus disregarding the just and common practice of the court cannot be precisely defined by rule." To the same effect see Winning v. Winning, 366 Ill. 57.

In the present case the allegations of the verified petition show that at the time of the alleged acts of cruelty and afterward defendant was mentally ill, and that shortly after the decree was entered she was admitted to the psychopathic hospital in Chicago and after a court hearing was committed to the State Hospital at Elgin, Illinois.

From the comments of the trial court which appear in the record it is manifest that the court did not act arbitrarily in setting aside the decree but was prompted by a desire to protect the interests of the State in maintaining the marital relationship. Under the circumstances we cannot say that the court abused its discretion in vacating the divorce decree without notice.

At the hearing on December 29, 1949 plaintiff's counsel asked for a continuance on the ground that he did not have sufficient time to interview some of the witnesses and prepare his defense. Over his objection the trial court proceeded to hear the testimony of defendant's father and her brother, who testified in substance that defendant was mentally incompetent long before the complaint was filed and afterward; that she was adjudged mentally ill and sent to a State hospital, and that the plaintiff knew of her condition. At the conclusion of the hearing the court entered the order dismissing the complaint. According to the plaintiff's attorney because of lack of time for preparation he was unable to offer any evidence to refute the testimony of defendant's father and brother. The short continuance requested by plaintiff could not result in prejudicing the rights of defendant. We think the court should have given plaintiff additional time to plead or answer the petition and to prepare his defense.

For the reasons given, the order of December 20 is affirmed and the order of December 29 dismissing the complaint for want of equity is reversed and the cause is remanded for further proceedings not inconsistent herewith.

AFFIRMED IN PART AND REVERSED IN PART,
AND REMANDED FOR FURTHER PROCEEDINGS.

BURKE, P.J. AND KILEY, J. CONCUR.

45180

CHARLES J. SHEMAITIS, Appellant,	)	APPEAL FROM
v.	)	CIRCUIT COURT
LOUISE M. SHEMAITIS, Appellee.	)	COOK COUNTY.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a complaint in the Circuit Court of Cook County to annul a divorce decree granted defendant in Garland County, Arkansas, on the ground that defendant was not a bona fide resident of Garland County at the time of filing her complaint in that county.

January 17, 1950 an order was entered which reads: "On motion of Alois S. Knapp, attorney for plaintiff herein, and the court having read the complaint and answers and having heard the argument of counsels, it is ordered that the within cause be dismissed without prejudice to either party. It is so ordered accordingly. Enter: Roberts, Judge."

January 31, 1950 plaintiff filed a petition which avers, among other things, that, "On January 17, 1950 the said complaint was dismissed without prejudice, it being understood that it was to be reinstated within thirty days if any good cause was shown for such action." The petition prays that the order of January 17th be vacated and the cause reinstated. On the same day (January 31) an order was entered denying the prayer of the petition. Plaintiff appeals from both orders. No appearance has been filed in this court by defendant.

According to the record the complaint was filed January 11, 1948 and Sol R. Friedman and I. S. Friedman appeared as plaintiff's attorneys. September 22, 1949 the Friedmans withdrew as attorneys for plaintiff, and Alois S. Knapp entered his appearance and the cause was set for hearing on October 13, 1949. October 13th the hearing was continued to December 12th. December 12, 1949, on motion of Alois S. Knapp attorney for plaintiff, the cause was set for hearing on January 10, 1950 at two p.m. This order was signed by Judge Roberts.

January 10, 1950 Alois S. Knapp appeared in behalf of plaintiff before Judge Roberts and had the cause continued to January 17, 1950, when the order here appealed from was entered. The record also shows that on December 19, 1949 the Friedmans, as attorneys for plaintiff, appeared before Judge Elmer Schnackenberg and set the cause for "trial and disposition" on February 14, 1950.

When the Friedmans appeared in behalf of plaintiff before Judge Schnackenberg on December 19, 1949, they were no longer the attorneys of record for plaintiff. Nor does it appear that they had any authority to represent the plaintiff before Judge Schnackenberg. We must assume therefore that the cause was assigned to the call of Judge Roberts and that Alois S. Knapp had authority to speak for the plaintiff.

In their brief counsel for plaintiff, after arguing the merits of the complaint, assert that the decision of Judge Roberts dismissing plaintiff's cause of action was in effect overruling the original decision on defendant's motion to strike. The record shows that on January 17, 1950

the then attorney for plaintiff (Alois S. Knapp) dismissed the cause on his motion. By voluntarily dismissing his suit plaintiff waived any error the trial court may have committed. (Newman v. Dick, 23 Ill. 278.) A party generally is estopped or waives his right to appeal where the order was entered on his motion. See 4 C.J.S., p. 405, sec. 213. Since the order shows that the court was induced by plaintiff to enter it, he cannot be heard to assign error.

As to the order of January 31, 1950, it appears from the petition that at the time of the dismissal of the complaint of January 17th there was an agreement between the parties to reinstate the cause. There was no proof of any agreement. In any event, the matter of vacating the former order of January 17th within the term at which it was entered and reinstating the cause rested in the sound discretion of the trial court. In the absence of any showing of an abuse of the trial court's discretion we are impelled to affirm the order.

For the reasons given, the orders appealed from are affirmed.

ORDERS APPEALED FROM AFFIRMED.

BURKE, P.J., AND KILEY, J., CONCUR.

45194

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel., PETER G. ANDERSEN, J. HERMAN GEHRKE and JOSEPH SIEB, Appellants, v. J. A. FIREK, CLARENCE H. RODLEY and LOUIS HORTON, Board of Trustees of the Norwood Park Sanitary District, Appellees.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is a mandamus proceeding to compel the Clerk of the Norwood Park Sanitary District in Cook County, Illinois to accept a petition asking that the question of acquiring the water works system and the issuance of revenue bonds be submitted to the electors of the District at a special election as provided by Illinois Revised Statutes 1947, chapter 42, paragraph 443(f).

Respondents' motion to strike the petition for a writ of mandamus was overruled and after having elected to stand by their motion the court entered judgment awarding the writ. Respondents appealed to this court where the judgment was reversed and the cause remanded to the trial court with directions. (People ex rel. Andersen v. Firek, 337 Ill. App. 92.) In the trial court after remandment Relators amended their petition charging that Respondent Horton as Clerk of the District willfully absented himself from his home during the evening hours of June 1st and 2nd 1948 for the purpose of preventing Relators from filing

their petition with the Clerk within the statutory period of twenty-one days. Issues were joined and evidence heard in open court. The trial judge found the issues in favor of Respondents and dismissed the complaint.

Respondent Louis Horton resides within the Sanitary District at 4424 North Harlem Avenue where he operates a small truck farm consisting of about eighteen and a half acres. He is one of three elected trustees of the Sanitary District. Each of the trustees receives $300 annually for his services. Respondent Horton acted as Clerk of the District without additional compensation and generally transacted the business of the Sanitary District at his farm in the daytime. He did not keep regular office hours but occasionally conducted the business of the Sanitary District in the evening by appointment.

The ordinances in question were posted May 12, 1948, and the last day for filing Relators' petition for the special election was June 2nd. Relators' petition was not completed and ready for filing until about 6:45 o'clock p.m. on June 1, 1948. During the summer months Respondent Horton worked every day in the field adjacent to his home, usually from seven o'clock in the morning until late in the afternoon. Shortly before seven o'clock p.m. on June 1, 1948 Horton went to the home of one Petersen, a sewer maintenance man for the Sanitary District, to examine some District sewer maps which were in Petersen's possession. He remained at Petersen's home, which is about a half mile distant, until midnight. About seven o'clock p.m. on June

1st, Relators went to the home of Horton to present the petition for filing and found Horton absent. They made two other visits afterward the same evening for the same purpose. There was evidence that Relators told Respondent Horton's wife and daughter of their purpose on the evening of June 1st and that they would return with the petition on the following evening. This was denied by Mrs. Horton and her daughter. There was no evidence that the Relators gave Respondent advance notice that they were coming to his home on June 1st to present the petition.

June 2nd, 1948, the last day for the filing of Relators' petition, Respondent Horton worked on his farm from approximately seven o'clock in the morning until three or four o'clock in the afternoon. He left his home about five o'clock p.m. and went to the city of Chicago on some personal business.

On June 2nd Relator Gehrke had possession of the petition for the referendum election. About noon of that day he took the petition to the Judge of the County Court of Cook County, who advised him to file it with the Clerk of the Sanitary District. Gehrke made no attempt to serve Horton during the daytime but called at his home about seven o'clock in the evening. When he arrived he was informed by Mrs. Horton that the Respondent had left for the city of Chicago, whereupon Relators tendered the petition to Mrs. Horton. Mrs. Horton refused to accept the petition for filing. The testimony of Respondent Horton is uncontroverted that he worked in his field contiguous to his home on June 1st and June 2nd, 1948 from 7:30 in the morning until late in the

afternoon; that on both days during the periods when he was at work in his field he was in plain sight and accessible to all persons coming to his home for the purpose of transacting business relating to the Sanitary District. Respondent Horton denied that anyone informed him that a petition for special election would be filed and that he had any knowledge that such a petition was in existence. According to Respondents' testimony the Clerk was available at all reasonable hours in the daytime, thus affording Relators an opportunity to file their petition within the period prescribed by the statute. No valid reason has been suggested for Relators' failure to present the petition to the Clerk for filing during the daytime on June 2nd.

Whether Respondent Horton deliberately evaded Relators' attempt to file the petition presented a question of fact which was resolved by the trial court in favor of Respondents.

During the trial Relators amended their petition on the theory that Respondent Horton's wife was a deputy or agent and that the tender of the petition to her was a compliance with the statute. The evidence shows that many of the applications for sewer connections received by the Sanitary District were filled out by the wife of Respondent and that she also receipted for moneys on sewer permits. Respondent Horton testified that he had difficulty in writing because of a stiff hand; that all the applications were filled out under his supervision and direction; that most of the transactions occurred in his presence, and that none of

the applications were accepted until he had examined them. Under the provisions of Illinois Revised Statutes 1949, (State Bar Assn. Ed.) chapter 42, paragraphs 414 and 415, the Clerk is required to be a trustee of the Sanitary District and must take an oath and give bond. So far as the record shows Mrs. Horton has not met any of these requirements. Nor does the statute make any provision for a deputy. We think this contention is without merit.

From a careful examination of the record, which consists of more than nine hundred pages, we think the findings of the trial court are amply supported by the evidence. We must give due weight to the trial court's superior advantage in passing on the facts and judging the credibility of the witnesses. (Jorn v. Tallett, 341 Ill. App. 240.) The finding of a trial court in a case tried without a jury is entitled on review to the same weight as the verdict of a jury and if the evidence is contradictory such finding will not be reversed on appeal unless it is contrary to the manifest weight of the evidence. (Winnetka Park Dist. v. Hopkins, 371 Ill. 46; Mayflower Sales Co. v. Frazier, 325 Ill. App. 314.)

For the reasons given, the judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. AND KILEY, J., CONCUR.

45306

PEOPLE OF THE STATE OF ILLINOIS ex rel., ERNEST STROZIER, Appellee, v. MARTIN H. KENNELLY, Mayor of the City of Chicago; THE CITY OF CHICAGO, a Municipal Corporation; and JAMES W. JARDINE, Public Vehicle License Commissioner, Appellants.	APPEAL FROM SUPERIOR COURT COOK COUNTY.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Defendants appeal from a judgment in a mandamus proceeding commanding the City of Chicago and its licensing officers to renew a taxicab license to plaintiff for the year 1950. Issues were joined and after evidence was heard the court entered judgment awarding the writ to plaintiff.

No brief has been filed in this court by plaintiff.

Plaintiff Strozier and defendant James W. Jardine, public vehicle license commissioner of the City of Chicago, both testified by deposition in their own behalf. The essential facts are uncontroverted. Plaintiff was the holder of taxicab license number 5313 for the year 1949. He and a number of other licensees for the year 1949 were notified that they were not entitled to renewal licenses and were instructed to remove their taxicabs from service on or before March 15, 1950. Plaintiff was engaged in what is commonly known as "jitney" cab operation.

Section 2, chapter 196-1 A of the Municipal Code provides among other things that licenses shall not vest in licensees any contractual or property right and shall not be subject to assignment, lease or other voluntary or involuntary transfer except for replacement of a taxicab for that license. The owner may designate any licensed driver to operate said taxicab and the commissioner shall issue said driver a certificate or card of identification as the authorized driver of said taxicab. Where two persons are the joint owners of said taxicab no person other than one of the owners is permitted to drive the same and the names of both such persons shall appear upon the taxicab as provided by section 29-19 of the Municipal Code.

Licenses issued under the provisions of the foregoing ordinance cannot be leased or assigned and plaintiff was bound to operate personally his taxicab. Plaintiff failed to drive his taxicab during the months of August, September, October and November 1949. During this period he leased his cab to his uncle one Willie Womack. While Womack operated the cab plaintiff charged him six dollars a day for its use and Womack retained his receipts from the operation under plaintiff's license.

Chapter 28, section 20 of the Municipal Code reads: "It shall be the duty of the driver of a taxicab to accept for transportation from and to any place within the city one person or any number of not more than five persons who may apply for transportation as a group; provided that additional passengers under twelve years of age accompanied by an adult

passenger shall be accepted for transportation if the taxicab has seating accommodations for them. No passenger shall be permitted to ride on the front seat with the driver of the taxicab."

Section 28-23 provides that, "Taximeters shall be equipped with a flag at least three inches by two inches in size, either painted red or bearing thereon in letters at least one inch in height the word 'vacant' or the words 'for hire.' The flag post of such flag shall be kept up or towards a vertical position when the taxicab is for hire, and said flag post shall be kept down or toward a horizontal position when such taxicab is engaged."

Section 28-29 of the Code provides for the rates of fare for taxicabs.

Plaintiff admitted soliciting and accepting passengers for group riding, in violation of the provisions of chapter 28, section 20 of the Municipal Code of Chicago. These passengers were transported for hire without the use of a taximeter to record the fares payable and the rates of fare collected from passengers were different from the rates established by section 28-29 of the Municipal Code.

In People v. Thompson, 341 Ill. 166 at page 169 the court said: "No one has any inherent right to use the streets or highways as a place of business. Where one seeks a special or extraordinary use of the streets or public highways for his private gain, as by the operation of an omnibus, truck, motorbus or the like, the State may regulate such use of the vehicle thereon or may even prohibit such use." To

the same effect see Yellow Cab v. City of Chicago, 396 Ill. 388.

In the instant case, by his own testimony, plaintiff Strozier admitted repeated violations of the ordinances regulating the operation of taxicabs in the City of Chicago.

In the absence of an abuse of discretion by a public officer the writ will not lie to compel the performance of acts or duties which necessarily call for the exercise of judgment and discretion on the part of the officers at whose hands their performance is required. See People v. Dever, 238 Ill. App. 255. Here the evidence clearly shows that the defendant Jardine, public vehicle commissioner, exercised his discretion reasonably, and we are therefore impelled to hold that the court erred in issuing the writ.

For the reasons stated, the judgment is reversed.

JUDGMENT REVERSED.

BURKE, P.J., AND KILEY, J., CONCUR.

Gen. No. 10,449. Agenda No. 19.

IN THE

APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT.

OCTOBER TERM, A. D. 1950.

CLIFFORD JANSSEN, Plaintiff-Appellant, vs. CLARENCE FREESE, Defendant-Appellee.	Appeal from Circuit Court of Ogle County.

WOLFE,-- P. J.

Clifford Janssen on March 14, 1949, was driving his automobile in a northerly direction on a paved highway in the County of Ogle. At the same time Clarence Freese was driving his car in a southerly direction on the same highway. As the cars proceeded along on this highway, they had reached a curve about one mile north of Byron, Illinois, where the two cars collided.

Janssen started a suit against Freese in the Circuit Court of Ogle County for personal injuries he had sustained and for damages to his automobile. The defendant, Freese, filed a counterclaim against Janssen for personal injuries he had received in the collision, and for damages to his automobile.

The case was submitted to a jury that found the issues

in favor of the counterclaimant, Clarence Freese, and against Janssen and assessed his damages at $12,000.00. The jury found Freese not guilty in the original suit. At the close of plaintiff's case and at the close of all of the evidence, plaintiff, Janssen, asked to have the jury instructed to find in his favor, but the Court overruled the motion in each instance. A motion for a new trial was entered by Janssen and it was overruled by the Court. The Court then entered judgment on the verdict against Janssen and in favor of Freese for $12,000.00. It is from this judgment that this appeal has been prosecuted.

The appellant has filed a motion to strike appellee's brief and argument from the files, claiming that it is not prepared in accordance with the Supreme Court Rules. This motion was taken with the case, and after duly considering the same, the motion to strike appellee's brief is denied.

The appellant has assigned seven errors relied upon for reversal, but has only argued one; namely, that the verdict is contrary to the manifest weight of the evidence, so the other assignments of error will be considered waived. Horner vs. Jamieson, 394 Ill. Page 222 and Fugett vs. Murray, 311 Ill. App. 323.

The plaintiff and the defendant were the only eyewitnesses to this accident and their version of what happened is in direct conflict. The plaintiff claims that the defendant crossed over into his lane of traffic, and that it was his carelessness that caused the accident. The defendant claims the plaintiff drove his car over into his lane of traffic, and it was his carelessness

that caused the accident. There is some evidence that there was glass and oil on the east side of the pavement, which was the traffic lane the plaintiff was travelling in, which he claims tends to show that the accident occurred on the east side of the pavement. He argues that this shows the defendant crossed over the line into plaintiff's lane of traffic, and it was the defendant's negligence which caused the accident. The defendant had some witnesses to corroborate him in his statement that the plaintiff crossed the line over into his lane of traffic, and it was his negligence that caused the accident.

The defendant testified that he and the plaintiff were in the same room in adjoining beds in the hospital after the accident; that he had a conversation with the plaintiff relative to the accident; that Janssen told him that he didn't remember anything about the accident, and didn't know what had happened.

Virginia Sampson testified that she was a friend of Clarence Freese, but did not know Clifford Janssen until after the day of the accident; that she visited Clarence Freese every night that he was in the hospital; that the men's beds were in the same room. She said that on March 17th Janssen called her over to his bed and he asked her "if he, Freese, was over to see her that night" and she answered "he was." He then said "it was too bad it had to happen, that he had stopped at Byron to get a cup of coffee and there was no place open. He said he didn't remember leaving Byron."

Mary Williams was called as a witness for the defendant and testified that she was a nurse in the hospital, and did not

that caused the accident. [illegible]
was placed [illegible] oil [illegible]
the traffic [illegible]
claims there [illegible]
side of the [illegible]
crossed over [illegible]
was the defendant [illegible]
defendant had [illegible]
that the [illegible]
traffic, and [illegible]

The defendant [illegible]
were in the same [illegible]
the accident [illegible]
relative to the accident [illegible]
remember [illegible]
but they could.

Verdict [illegible]
Clarence Brown, [illegible]
the day of the accident [illegible]
might well be [illegible]
the same room. [illegible]
over to [illegible]
see her this night [illegible]
"It was one [illegible]
to get a cup of coffee [illegible]
he didn't remember leaving [illegible]

Mary Williams [illegible]
and testified that she was [illegible]

know Clarence Freese or Clifford Janssen until after she saw them in the hospital; that their beds were only a few feet apart; that she heard a conversation that Clifford Janssen had with Clarence Freese; that she heard Janssen say, "that he had taken two jobs working in a factory in Rockford, and in a restaurant, and that he hadn't too much sleep doing both jobs; that he was tired the day of the accident and that he didn't remember leaving Byron."

Janssen was called to the witness stand and said he did not remember making such statements. No doubt these statements of Janssen had considerable effect on the jury in weighing his evidence, and they might well believe that what he had stated at the hospital was true, and that he did not remember leaving Byron, nor how the accident occurred. Where the evidence is in hopeless conflict and irreconciliable, it is not the province of an appeal Court to substitute its judgment for that of the jury, or upset their verdict even if we were to reach a contrary conclusion, for this would be invading a constitutional prerogative of the jury. It must be conceded that the evidence in the present case is very conflicting, but the jury has seen and heard the witnesses testify, and it was their duty to weigh the evidence and for them to decide as between the parties. In the present case we are bound to follow their verdict, and the judgment appealed from is hereby affirmed.

Judgment affirmed.

Gen. No. 10452. Agenda No. 16.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT.

OCTOBER TERM, A. D. 1950.

ERIC F. ANDERSON, Plaintiff-Appellant, vs. CHESTER G. SAMUELSON and DONALD C. SAMUELSON, Defendants-Appellees.	Appeal from the Circuit Court of Rock Island County.

WOLFE,-- P. J.

Eric F. Anderson instituted a suit against Chester G. Samuelson and Donald C. Samuelson to recover damages for personal injury sustained while crossing 14th Avenue in the City of Rock Island, Illinois. The complaint consisted of one count and alleges that Anderson himself was in the exercise of ordinary care and caution for his own safety, and that the defendants were negligently operating an automobile in a westerly direction, and struck the plaintiff and seriously injured him.

The acts of negligence charged in the complaint are: (a) That he violated the speed ordinance of the city of Rock Island, Illinois; (b) that he was driving his motor vehicle on the left-hand or south side of 14th Avenue, which was normally used for the eastbound traffic. (c) That he was passing a bus of the Tri-City Lines in the middle of the block on the south side of the center of 14th Avenue, and without sounding any horn or any other warning. (d) Failing to keep a proper lookout for pedestrians on 14th Avenue

Gen. No. 10452.

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

WOLFE,-- P. C.

[illegible]

Samuelson and Donald C. [illegible]

injury sustained while crossing [illegible]

Island, Illinois. The complaint [illegible]

that Anderson himself was in [illegible]

caution for his own safety, [illegible]

ly operating an automobile in [illegible]

plaintiff and serious injury [illegible]

The acts of negligence [illegible]

(a) That he violated the speed [illegible]

Illinois; (b) that he was driving [illegible]

or south side of 51st Avenue, [illegible]

bound traffic. (c) That he was [illegible]

in the middle of the floor on the south side of [illegible]

Avenue, and without sounding any horn or any other warning. (d)

Failing to keep a proper lookout for pedestrians on 51st Avenue

who were in the act of crossing 14th Avenue. (e) Failure to have or keep his motor vehicle under proper control so as to have avoided striking the plaintiff. He claimed damages in the sum of $25,000.00.

The defendants filed their answer and denied all allegations of negligence in the complaint. They admit the ownership and operation of the automobile in question, by the defendant, Donald C. Samuelson. They also admit that the plaintiff, Eric F. Anderson, was at the time in the act of crossing south over 14th Avenue halfway between 38th Street and 39th Street, but denied he was in the exercise of reasonable care for his own safety in doing so. The case was submitted to a jury. At the close of plaintiff's case the defendant, Chester G. Samuelson, the owner of the car, moved for a directed verdict of not guilty. The Court allowed this motion and instructed to find a verdict of not guilty, as to Chester G. Samuelson. A like motion was filed by Donald C. Samuelson, the driver of the car, but was overruled as to him. Evidence was heard. The jury returned a verdict in favor of Chester G. Samuelson and Donald C. Samuelson. After the verdict of the jury, the plaintiff filed a motion for a new trial, which was denied by the Court. Judgment was entered on the verdict, and the plaintiff has prosecuted an appeal to this Court.

The evidence shows that Donald C. Samuelson was driving his car in a westerly direction on 14th Avenue in Rock Island, Illinois; that he followed a bus of the Tri-City Lines in the vicinity of 39th Street; that the bus had stopped at the corner of 39th and 14th Avenue and pulled away from the corner going west; that he started to pass the bus about halfway between 39th and 38th Street, opposite an alley between 38th and 39th Street north of 14th Avenue; that there were no cars approaching on

who were in the act of crossing 47th Av nue. (a) failure to have or keep his motor vehicle under proper control so as to have avoided striking the plaintiff. He claimed damages in the sum of $25,000.00.

The defendants filed their answers denying all allegations of negligence in the complaint. They admitted ownership and operation of the automobile in question, by the defendant, Donald C. Samuelson. The defendants and plaintiff, Earle C. Anderson, were in the habit of crossing south over 47th Avenue Railway between 39th Street and 37th Street, but denied he was in the exercise of reasonable care for his own safety in doing so. The case was submitted to a jury. At the close of plaintiff's case the defendant, Donald C. Samuelson, the owner of the car, moved for a directed verdict of not guilty. The Court allowed this motion and instructed the jury to find a verdict of not guilty, as to Defendant D. Samuelson. A like motion was filed by Donald C. Samuelson, the driver of the car, but was overruled as to him. Evidence was heard. The jury returned a verdict in favor of defendant D. Samuelson, and Donald C. Samuelson. Upon the verdict of the jury, the plaintiff filed a motion for a new trial, which was denied by the Court. Judgment was entered on the verdict, and the plaintiff has prosecuted an appeal to this Court.

The evidence shows that Donald C. Samuelson was driving his car in a westerly direction on 47th Avenue in Moon Island, Illinois; that he followed a bus of the Tri-City Lines in the vicinity of 39th Street; that the bus had stopped at the corner of 39th and 47th Avenue and pulled away from the corner going west; that he started to pass the bus on the Railway between 39th and 38th Street, opposite an alley between 38th and 37th Street north of 47th Avenue; that there were no cars approaching on

14th Avenue travelling east at the time; that he did not sound his horn in passing the bus; that he struck the plaintiff, as Anderson stepped out from in front of the bus; that at the time of the accident, Samuelson was on the south half of the pavement, and that the plaintiff was about two or three feet south of the center line of the pavement when he was struck; that Samuelson stopped his car within ten feet after he struck the plaintiff.

The evidence shows that the plaintiff had driven his car in a westerly direction on 14th Street accompanied by two ladies. He parked his car east of an alley on the north side of 14th Avenue in front of a grocery store. The plaintiff got out of his car on the left or south side, and the two ladies with him got out of the car on the north side; that all saw the bus approaching and the ladies did not attempt to cross the street in front of the bus, but the plaintiff did. The bus at the time was on the north side of 14th Avenue, and there were cars parked on both sides of the street. They did not see the defendants' car approaching; that the plaintiff was beyond the middle of the street when they heard the crash and plaintiff was thrown through the air and landed in the street in the south lane of traffic; that the plaintiff and the two ladies were going across the street to the Ritz Sandwich Shop.

The defendant testified that he was driving his car at about twenty miles per hour; that he was about even with the front end of the bus when the plaintiff suddenly stepped out in front of him not over five feet away; that he immediately applied his brakes and stopped his car within ten feet; that he struck the plaintiff and threw him into the air; that he got out of his car immediately and went to the plaintiff and then moved his car into the alley facing south.

There is very little dispute of how this accident occurred.

High Avenue travelling [illegible] fast, that he did not sound his horn in passing the bus; that he attempt[illegible] plaintiff, as Anderson stopped his car in front of the bus, [illegible] the time of the accident, Sandefur was in the south half of the pavement, and that the plaintiff was [illegible] or three feet south of the center line of the pavement [illegible] Sandefur stopped his car [illegible] plaintiff.

[illegible] plaintiff [illegible] Sandefur his car in a westerly direction [illegible] Light Street and [illegible] by two ladies. He [illegible] the east of a [illegible] of High Avenue in [illegible] stopping [illegible] got out of his car [illegible] north side, [illegible] which the car [illegible] car on the north side [illegible] all saw the car approaching [illegible] ladies [illegible] to cross the car [illegible] front of the bus, [illegible] side. The bus at the time was on the south side of [illegible] Avenue, and there were cars parked on both sides of the street. [illegible] the defendant's car appeared [illegible] the middle of the street [illegible] the car. The plaintiff was thrown through the air and landed in the street in the south line of traffic; then the plaintiff and the [illegible] going across the street to [illegible] the Sandefur shop.

The defendant testified that he was driving his car at about twenty miles per hour; that he was alone; that with the front end of the bus when the plaintiff suddenly stepped out in front of him not over five feet away; that immediately applied his brakes and stopped his car within ten feet; that he struck the plaintiff and threw him into the air; that he got out of his car immediately and went to the plaintiff and then moved his car into the alley leaving south.

There is very little dispute of how this accident occurred

The plaintiff deliberately walked in front of the bus and was only a few feet past it when he was struck by the plaintiff. He knew, or should have known that in crossing the street as he was, that cars were liable to be passing the bus. It appears to us from the evidence in this case that the plaintiff was not in the exercise of ordinary care for his own safety at the time that he was struck by the defendants' automobile.

There were five acts of negligence charged in the complaint. There is some dispute whether this was a business district or a residential district at the place where the accident occurred. There is no evidence to contradict the defendants' evidence that he was driving at the rate of speed of about twenty miles per hour, except the driver of the bus who said that the car appeared to him to be coming fast. What he meant by fast, the evidence does not disclose, so that that charge of the complaint is not proven.

The next charge is that he was driving his vehicle on the left-hand side of 14th Avenue upon a portion normally used for eastbound traffic. The evidence is uncontradicted that the bus was travelling at the rate of ten miles per hour, or less. Certainly the defendant had a right to pass the bus in the middle of the block, as he was attempting to do at this time.

It is next charged that he was passing a bus in the middle of the block on the south side of the center of 14th Avenue without sounding any horn, or other warning. It is also insisted that the defendant was guilty of negligence in not sounding any warning, as he was passing the bus in question. According to the evidence in this case, the plaintiff stepped out from in front of the bus and immediately into the path of the oncoming automobile, and the defendant had no opportunity of sounding a warning.

The plaintiff deliberately walked in front of the bus and was only a few feet past it when he was struck by the [illegible]. He knew, or should have known, that in crossing the street as he did, that care were liable to be [illegible] exercised on his own. It appears from the evidence in this case that the plaintiff was not in the exercise of ordinary care for his own safety at the time that he was struck by the defendant's motor bus.

There have been cases [illegible] in the complaint. There is no dispute [illegible] defendant or a [illegible] driver [illegible] the accident occurred. [illegible] evidence that he was traveling at a rate of [illegible] miles per hour, [illegible] that the car appeared to be [illegible]. But [illegible] the evidence does not disclose, so that the charge of the complaint is not proven.

The [illegible] in the [illegible] the [illegible] Avenue [illegible] for [illegible]. The [illegible] bus was traveling at a rate of [illegible] or less. Certainly the defendant [illegible] in the middle of the block, in the [illegible] at this time.

It is more charged that the [illegible] a bus in the middle of the block on the [illegible] avenue without [illegible] any horn, or other warning. It is also insisted that the defendant was guilty [illegible] any warning, as he was passing the [illegible]. According to the evidence in this case, the plaintiff [illegible] out from in front of the bus and immediately into the path of the oncoming automobile, and the defendant had no opportunity to sounding a warning.

In regard to the next assigned negligence, "that the defendant failed to keep a proper lookout for a pedestrian on crossing 14th Avenue including the plaintiff who was in the act of crossing 14th Avenue," it was impossible for the defendant to see the plaintiff until he stepped out from in front of the bus, as it is a common knowledge that a bus is higher than the ordinary automobile.

There is no evidence whatsoever, that the defendant failed to keep his motor vehicle under proper control so as to avoid striking the plaintiff, and it is uncontradicted that he stopped his automobile within ten feet after striking him.

We cannot agree with plaintiff's contention that the evidence in this case would support a verdict in favor of the plaintiff, as we think it clearly shows that the plaintiff's own negligence was the proximate cause of his injuries, and a verdict in his favor could not stand, regardless of whether the defendant was guilty of any negligence that was the proximate cause of the plaintiff's injuries.

The plaintiff insists that the Court erred in giving nineteen instructions for the defendant, as they presented only seven to state their side of the case. There is no hard and fast rule that the Court can lay down in regard to the number of instructions that either side in a lawsuit should present to the Court, but the Courts have repeatedly held that any particular point in the case should not be overemphasized by giving numerous instructions relative to the same. We cannot say under the circumstances in this case that the plaintiff was prejudiced by the number of instructions the Court gave on behalf of the defendant.

Complaint is made of defendants' given instruction Number

In regard to the next assigned negligence, that the defendant failed to keep a proper lookout, or, proceeding on crossing 14th Avenue including the plaintiff, in the act of crossing 14th Avenue, it is in evidence that the defendant to see the plaintiff would be standing in front of the bus, as it is a common knowledge that a bus is higher than an ordinary automobile.

There is no evidence whatsoever, that the defendant failed to keep his motor vehicle under control so as to avoid striking the plaintiff, and if he did, he immediately stopped his automobile within ten feet of the plaintiff.

We cannot agree that plaintiff's contention that the evidence in this case would support a verdict in favor of the plaintiff. As we think it clearly shows that the plaintiff's own negligence was the proximate cause of his injuries, and a verdict in his favor could not stand, regardless of whether the defendant was guilty of any negligence in the proximate cause of the plaintiff's injuries.

The plaintiff insists that the Court erred in giving nineteen instructions for the defendant, as they were confused and seven to state their side of the case. There is no hard and fast rule that the Court can lay down in regard to the number of instructions that either side in a lawsuit should present to the Court, but the Courts have repeatedly held that any particular point in the case should not be overemphasized by giving numerous instructions relative to the same. We cannot say under the circumstances in this case that the plaintiff was prejudiced by the number of instructions the Court gave on behalf of the defendant.

Complaint is made of defendants' given instruction Number

9, relative to the speed in miles per hour that a motor vehicle should be driven, and that there is no precise speed limit, but must be reasonable and proper, having regard to the traffic, and the use made of the way etc., and it is for the jury to say from the evidence in the case whether the automobile was being driven at an unreasonable rate of speed. We think this instruction was proper.

Instruction Number 11, was that part of the statutory provision which is as follows: "Every pedestrian crossing the roadway at any point other than within a marked crosswalk, or within any unmarked crosswalk at an intersection shall yield the right of way to all vehicles on the roadway." The instruction then concluded, "and the Court instructs the jury that if you believe from the evidence in this case the collision here involved was caused by the failure of the plaintiff to comply with this state statute and that such failure was negligence proximately contributing to cause the collision, you should find the defendant, Donald Samuelson not guilty." The objection to this instruction is that the full section was not included in it, which is as follows: "Notwithstanding the provision of this section every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway, and shall give warning by sounding the horn when necessary, and shall exercise proper precaution upon observing any child or any confused or incapacitated person upon a roadway." As before stated, the defendant was driving his car at a reasonable rate of speed in passing the bus where he has a legal right to do so, and he had no opportunity to observe the plaintiff in time to avoid striking him, or to give any warning of his approach, and it would scarcely be expected that a pedestrian would step out in front of a moving bus right into the path of the oncoming automobile, and under the circumstances in this case it is not error to omit that part of the statute.

9, relative to the speed in miles per hour that a motor vehicle should be driven, and there is no precise speed limit, but must be reasonable and proper, having regard to the traffic, and the use made of the way etc., and it is for the jury to say from the evidence in the case whether the motor driver was being driven at an unreasonable rate of speed. We think this instruction was proper.

Instruction number 11, was part part of the statutory provision which is as follows: "Every pedestrian crossing the roadway at any point other than within a marked crosswalk, or within any unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway." The instruction then concluded, "and the Court instructs the jury that if you believe from the evidence in this case the collision and involved was caused by the failure of the plaintiff to comply with this state statute and that such failure was the proximate cause contributing to cause the collision, you should find the defendant Donald Samelson not guilty." The objection to this instruction is that the full section was not included in it, which is as follows: "Notwithstanding the provisions of this section every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway, and shall give warning by sounding the horn when necessary, and shall exercise proper precaution upon observing any child or any confused or incapacitated person upon a roadway." As before stated, the defendant was having his car at a reasonable rate of speed in passing the bus when he had a legal right to do so, and he had no opportunity to observe the plaintiff in time to avoid striking him, or to give any warning of his approach, and it would scarcely be expected that a pedestrian would step out in front of a moving bus right into the path of the oncoming automobile and under the circumstances in this case it is not error to omit that part of the statute.

Instruction No. 12, we think was properly given. Instruction Number 14 is as follows: "The jury are instructed that the plaintiff is required by law to establish his case by a preponderance of the evidence before he can recover. If the plaintiff in his suit has not so established his case, or if the evidence is evenly balanced so that the jury are in doubt and unable to say on which side is the preponderance, or if the preponderance of the evidence is in favor of the defendant, then, in either of these cases, the verdict should be not guilty." It is insisted that this instruction is bad and he cites two cases which support his contention. One, Third District appellate court, the other a Second District case of Healey vs. New York Central Ry. Co. 326 Ill. App. 556. For authority for the Healey vs. New York Central supra, this Court cited the case of Hughes vs. Medendorp, 294 Ill. App. 424, and quoted from it. Also in the opinion we cite the cases that were cited in the Hughes case; namely, Wolczek vs. Public Service Company, 342 Ill. 482, and Molloy vs. Chicago Rapid Transit Co. 335 Ill. 164. An examination of these two Supreme Court cases discloses that in neither of them was such an instruction given. In both of them, the instruction contained the words: "If the evidence preponderates in favor of the defendant although but slightly." Such an instruction was condemned as being erroneous. It will be noted that the same Court which decided the case of Hughes vs. Medendorp, supra, in a later case of Stivers vs. Black & Co. 315 Ill. App. Page 38 held that the instruction is a stock one, and has been repeatedly approved, and cites Koshinski vs. Ill. Steel Co. 231, Ill. 198; Chicago City Railway Co. vs. Nelson, 215 Ill. 436, and several other cases that have approved this instruction. We will now concede that what we said in Healey vs. New York Central Ry. case, supra, relative to this instruction is erroneous. The given instruction in the case we are now considering properly states the law.

Instruction No. 12, [illegible] as requested [illegible]. Instruction Number 14 is as follows: "The jury are [illegible] the plaintiff is required by law to establish his claim [illegible] preponderance of the evidence before he can recover. If the claim [illegible] is not so established, or if the evidence is evenly balanced so that the jury are in doubt and [illegible] is the preponderance, or if the preponderance [illegible] in favor of the defendant, then, in making up their verdict, the verdict should be for [illegible]." [illegible] this instruction is bad and [illegible] reason [illegible] support its contention. The [illegible] appellate court, in [illegible] Mr. [illegible] vs. New York Central [illegible], No. 327 Ill. [illegible], [illegible] for the [illegible] vs. [illegible] Central [illegible], [illegible] the case of [illegible] vs. Wabash, [illegible] Ill. [illegible], [illegible] that the [illegible] case [illegible] vs. [illegible], [illegible] Ill. [illegible], [illegible] that [illegible] case [illegible] vs. [illegible], [illegible] Ill. [illegible], [illegible] vs. [illegible], No. [illegible] Ill. [illegible], in [illegible] of these [illegible] [illegible] of them was such an instruction [illegible]. In [illegible] the instruction contained the [illegible] in favor of the defendant [illegible] "[illegible]" [illegible] as [illegible] which decided the case [illegible] vs. [illegible], [illegible] of Shivers vs. [illegible], No. 215 Ill. [illegible] that the instruction is a close one, and has been repeatedly approved, and cites Rockhurst vs. [illegible], [illegible] Ill. [illegible]; Chicago Railway Co. vs. Hobson, 210 Ill. [illegible], and several other cases that have approved this instruction. We will not [illegible] what we said in Hosley vs. New York Central [illegible], supra, relative to this instruction is erroneous. The given instruction in the case we are now considering properly states the law.

Instruction No. 18 told the jury that if the collision in question was caused by the negligence of both the plaintiff and the defendant there could be no recovery in this case by the plaintiff. We find nothing wrong in this instruction. The next one claimed to be erroneous is as follows: "The Court instructs the jury that if you believe from the evidence in this case that the defendant, Donald Samuelson, immediately prior to the accident in question, and without fault on his part, was placed in a sudden emergency with peril of collision imminent as the result of plaintiff's suddenly appearing or stepping out from in front of a moving bus, then you are instructed and under such state of proof, if such is the proof, the defendant, Donald Samuelson, would not be required to use the same degree of self-possession, coolness and judgment as when there is no imminent peril, but if, under such circumstances, he acted as an ordinarily reasonable person would have acted under the same or similar circumstances, he would not be guilty of negligence." Appellants main objection to this instruction is, that there is no evidence that the plaintiff stepped out from in front of the bus. As before stated we think the evidence clearly shows that he did step out from in front of the bus immediately in front of defendants' automobile, and under such circumstances the instruction is proper.

Instruction Number 20 informs the jury that: "The Court further instructs the jury that if you believe from the evidence in the case, that the alleged injury to plaintiff was accidental, and that the defendant was not negligent, the jury should find the defendant, Donald Samuelson, not guilty." We think the evidence in this case is such that the instruction was proper. Likewise, in Instruction Number 21, the evidence was such that the instruction was proper.

Instruction Number 24 is as follows: "The Court instructs

Instruction No. 20 told [illegible] that if the collision in question was caused by the negligence of both the plaintiff and the defendant there could be no recovery in this case by the plaintiff. [illegible] instruction. The next one [illegible] instructions the jury that if [illegible] from the evidence in this case that the defendant, Donald [illegible], was not, [illegible] in question, and without [illegible] negligence, [illegible] and in [illegible] emergency with peril or [illegible] imminent [illegible] the result of plaintiff's sudden [illegible] or [illegible] in front of a moving bus, then you are instructed [illegible] under such circumstances of peril, if such is the proven, the defendant [illegible] required to use the care [illegible] judgment as [illegible] circumstances, he acted [illegible] would have acted under the same or [illegible] be guilty of negligence. [illegible] abstraction [illegible] out from in front of the [illegible] evidence clearly shows [illegible] immediately in front of defendant's [illegible] circumstances the instruction is proper.

Instruction Number 20 informs the jury that "The Court further instructs the jury that if you believe from the evidence in the case, that the alleged injury to plaintiff was accidental, and that the defendant was not negligent, the jury should find the defendant, Donald [illegible], not guilty." We think the evidence in this case is such that the instruction was proper. Likewise, in Instruction Number 21, the evidence was such that the instruction was proper.

Instruction Number 21 is as follows: "The Court instructs

the jury that one method of impeaching a witness is by showing that he or she has made statements out of Court at variance with statements on the witness stand, and if the jury believe from the evidence that any witness in this case has made statements at any other time or place at variance with his or her evidence in this case, you have the right to take such fact into consideration in determining the weight to be given to the evidence of such witness."

The appellant insists that there is no evidence in this case on which to base this instruction. The witness, Edgar Rohr, the bus driver, on cross-examination was asked whether he made certain statements to a Mr. Wedean shortly after the accident occurred. Evidently the attorney was reading from the statement, as the witness later testified that he had read it and signed it with a statement that it was true. The statement itself was not introduced in evidence, so as to contradict the things he had testified or denied saying at the time the statement was taken. Technically, we think the instruction should not be given, but it is difficult to see how the jury could have been mislead by this instruction.

Instruction Number 23 is as follows: "If the jury believe, from the evidence, that any witness in this case has knowingly and willfully sworn falsely on this trial to any matter material to the issue in this case, then the jury are at liberty to disregard the entire testimony of such witness, except in so far as it has been corroborated by other credible evidence or by facts and circumstances proved on the trial. This instruction has been criticized by our Courts, but not for the reason given by the appellant. In instruction number 25, we find no objectional feature and on the whole we think that the jury was properly instructed. The judgment of the trial court is hereby affirmed.

Judgment affirmed.

the jury that one method of impeaching a witness is by showing that he or she has made statements out of Court in variance with statements on the witness stand, and if the jury believe from the evidence that any witness in this case has made statements at any other time or place in variance with his or her evidence in this case, you have the right to take such fact into consideration in determining the weight to be given to the testimony of such witness."

The appellant insists that there is no evidence in this case on which to base this instruction. The witness, Edgar Kohn, the bus driver, on cross-examination was asked whether he made certain statements to a Mr. Webster shortly after the accident occurred. Evidently the attorney was reading from the statement, as the witness later testified that he had read it and signed it with a statement that it was true. The statement itself was not introduced in evidence, so as to contradict the things he was testified or denied saying at the trial in statement was taken. Technically, we think the instruction should not be given, but it is difficult to see how the jury could have been misled by this instruction.

Instruction Number 25 is as follows: "If the jury believe, from the evidence, that any witness in this case has knowingly and wilfully sworn falsely on this trial to any matter material to the issue in this case, then the jury are at liberty to disregard the entire testimony of such witness, except in so far as it has been corroborated by other credible evidence or by facts and circumstances proved on the trial. This instruction has been criticized by our Courts, but not for the reason given by the appellant. In instruction number 25, we find no objectional feature and on the whole we think that the jury was properly instructed. The judgment of the trial court is hereby affirmed.

Judgment affirmed.

+2 Sec. Aff.
Adv. Pt. 8

45213

FRANCES POTERASKE, Appellee,	)	APPEAL FROM
v.	)	MUNICIPAL COURT
ILLINOIS MEAT COMPANY, a corporation, and A.J. SOBBE, Appellants.	)	OF CHICAGO.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action for damages for injuries which plaintiff alleges she suffered as a result of eating hash containing pieces of glass. In one count of her complaint plaintiff charges breach of an implied warranty by both of the defendants, and in the other, negligence on behalf of the defendant company. The jury's verdict set plaintiff's damages at $1000 and judgment was entered accordingly. Defendants have appealed.

Defendant Sobbe was operator of a retail self-service grocery store in Chicago. On March 22, 1949, plaintiff, then about 57 years of age, purchased at Sobbe's store a can of Broadcast Corned Beef Hash. Shortly thereafter, in her home, she opened the can and emptied its contents into a frying pan, into which she had already placed butter. She added a little milk and warmed the mixture. She placed the warmed hash in a china bowl which was then placed on the dinner table for her and her husband. She took three forkfuls of the hash and bit on a piece of glass which displaced fillings in two of her teeth, cut her gums and lodged in her throat. She removed the glass with her finger which

was cut in the process. She and her husband examined the remaining hash mixture and found another piece of glass in it. Several days later she went to a dentist who treated her gums during a period of three weeks and then pulled the two teeth. From time to time she complained to him of pain and nervousness. In January 1950 he treated her mouth for a day or two and removed two more teeth. In a few days he extracted two more. Eventually, in that month, he had removed all nine teeth in her lower jaw.

We think that justice requires that the judgment be reversed because of prejudicial error in the giving of plaintiff's instruction No. 14. Defendants made no objection to the instructions before the jury retired as required by Municipal Court Rule 60(5), interpreted in Paulick v. National Bank of Republic, 279 Ill. App. 160. The record is clear that defendants' attorney was not certain of the practice with respect to objecting to instructions. While this in itself is no excuse, it is clear that, when the instructions were submitted before argument to the jury, defendants' attorney was misled into the belief that the court would advise him which instructions would be given and which would not, so that objections could be made. Presumably the court recognized this when, after the jury retired, the court agreed that defendants' attorney had had no opportunity to make objections before that time and permitted him to read his objections into the record. For this reason we believe that defendants should not be held to have waived their rights to complain here.

We think the law is settled in Illinois that the

law imposes a warranty on the packer of sealed foods (Patargias v. Coca-Cola Bottling Co. of Chicago, Inc., 332 Ill. App. 117; Welter v. Bowman Dairy Co., 318 Ill. App. 305) and on the retailer of the sealed food. Wiedeman v. Keller, 171 Ill. 93; Chapman v. Roggenkamp, 182 Ill. App. 117; also Bowman v. Woodway Stores, Inc., 258 Ill. App. 307. In the Uniform Sales Act (Chap. 121½, sec. 15, Illinois Revised Statutes 1949) the legislature provided six exceptions under which warranties of quality in sales were implied. This Act was adopted subsequent to the decisions in Wiedeman v. Keller and Chapman v. Roggenkamp. The first exception imposes a warranty that goods shall be reasonably fit for the particular purpose which the buyer, expressly or by implication, informs the seller the goods are required to fill, provided it appears that the buyer relies on the seller's skill or judgment. The second imposes a warranty that the goods shall be of merchantable quality when they are bought by description from the seller who deals in goods of that description. It will be seen that in the second exception there is no requirement that it should appear that the buyer relied on the seller's skill or judgment. These exceptions cover a sale of canned corned beef hash. Bowman v. Woodway Stores, Inc., 258 Ill. App. 307; Ryan v. Progressive Grocery Stores, Inc., 175 N. E. (N.Y.) 105.

Plaintiff's complaint is broad enough to embrace a cause of action under either the first or second exception or causes of action under both. In her brief she says that food cases are based on the second exception rather than the first.

Instruction No. 14 told the jury that if plaintiff bought a can of corned beef hash from defendant Sobbe, prepared by defendant company, and if the can contained glass, without plaintiff's fault, and plaintiff's injuries resulted, it must find in favor of plaintiff. This instruction is peremptory and confusing. If it was intended to state the law of the second exception it failed to do so because it made no mention of warranty of fitness for human consumption or merchantable quality or words of similar meaning, and did not contain the element of purchase by description. It mentions absence of fault on plaintiff's part and suggests that it might have been intended to instruct on the negligence alleged in the second count. If so, it failed to state the law since it fails to include the element of defendant's negligence, charged in the complaint, or proximate cause, etc. We cannot say, as will be seen by what is later stated, from the verdict whether the verdict was on count one or both one and two. This instruction may have induced the jury to find defendant guilty on the negligence count. We think this instruction could have done no less than confuse the jury and, because it is peremptory, it was prejudicial to defendant.

Instruction No. 13 told the jury that an implied warranty that the food is fit for human consumption is imposed on the packer and the distributor of foods in sealed containers and that such warranty runs to the ultimate consumer. This is not a complete statement of the second exception. In the instant case the canned beef was bought by description, with no reliance on Sobbe's skill or judgment. There was

not omitted an essential element for there is no requirement of proof of reliance where the sale is by description. There was no prejudice therefore to defendant. Nevertheless, the instruction was inaccurate and because it is peremptory, it should have been accurate.

We think it will be useful, should the case be retried, for us to comment on the procedural points raised in this court. Only two forms of verdict were given to the jury; "We, the jury, find for the defendants" and "We, the jury, find for the plaintiff with $_____ damages". These forms were inadequate to cover the verdicts possible under the two counts in the complaint. Only the two forms were given by the attorneys to the trial court. Under count one verdicts of not guilty or of guilty were possible as to each of the defendants. Under count two a verdict of guilty or not guilty as to the defendant company only was possible.

The defendants' attorney sought to adduce from defendants' witness testimony to show that defendant company had received no complaints from other persons with respect to pieces of glass in cans of corned beef hash. The trial court sustained objections. Defendant cites Welter v. Bowman Dairy Co., 318 Ill. App. 305; Gantt v. Columbia Coca-Cola Bottling Co., 7 S. E. 2d (S. C.) 641; Zenkel v. Oneida County Creameries Co., 171 N.Y.S. 676, as authority for his claim of error in the court's ruling. The testimony in the Welter case was in behalf of plaintiff and to the effect that another substance had been found in a bottle of milk on another occasion. In the Gantt case the court noted that

ordinarily admission of this class of testimony was discretionary but that it should have been admitted in that case because of the singular testimony. We infer, because of the authorities referred to there, that the testimony of the finding of foreign substances in sealed containers on other occasions was admitted for plaintiff. In the Zenkel case there was testimony that a witness other than plaintiff had eaten some of the same brand of cheese at another store. The court approved the admission of negative testimony, that other persons had eaten the cheese and not been made sick, in rebuttal.

The record before us does not justify application of the doctrine of res ipsa loquitur. In Parolinelli v. Dainty Foods Manufacturers, Inc., 322 Ill. App. 586, plaintiff took a "clean pan", filled it with water drawn from a faucet having on it a "filter strainer" through which the instrument of injury could not have passed. In Rost v. Kee & Chapell Dairy Co., 216 Ill. App. 497, the broken glass was found in the bottle. In Roper v. Dad's Root Beer Co., 336 Ill. App. 91, the court distinguished between control of the agency at the time of the injury and at the time of the negligent act causing the injury. In the absence of a showing that the injurious agency had not been negligently handled after its delivery to the self-service market, the court said there could be no recovery.

For the reasons given the judgment is reversed and the cause is remanded for proceedings consistent with this opinion.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

BURKE, P.J., AND LEWE, J., CONCUR.

45213

FRANCES POTERASKE, Appellee,	)	APPEAL FROM
v.	)	MUNICIPAL COURT
ILLINOIS MEAT COMPANY, a corporation, and A. J. SOBBE, Appellants.	)	OF CHICAGO.

ON REHEARING.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

In this case a rehearing was granted on the petition of plaintiff Poteraske. Having considered the petition and the answer thereto we have decided to adhere to our opinion filed January 31, 1951.

JUDGMENT REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

BURKE, P.J., AND LEWE, J., CONCUR.

45185

In the Matter of THE ESTATE OF ELI HERMAN, Deceased.	)	
	)	APPEAL FROM CIRCUIT
MARIE SCHAUER, Claimant-Appellee,	)	COURT, COOK COUNTY.
v.	)	
MOLLIE PURZE, Administratrix of the Estate of ELI HERMAN, Deceased, Defendant-Appellant.	)	

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

In 1943 claimant Marie Schauer desired to purchase property at 733-43 North Oakley boulevard in Chicago, and the decedent Eli Herman, an attorney, undertook to represent her in the transaction. It is conceded that in June 1943 she deposited with him as purchase money the sum of $11,701.24. October 6, 1943 Herman advised her that the property had been acquired and was then available for conveyance to her by Herbert R. Lewis, the titleholder, "from whom I have a quit-claim deed for conveyance to you upon payment of the moneys agreed upon in the contract above stated [of June 11, 1943]." However, claimant never got title to the real estate, Herman having sold the property to someone else a year later. He thereupon returned to claimant the sum of $11,347.15 without disclosing his subsequent sale of the property to a third person. In the meantime claimant became liable for various sums of money expended by her, for commission on the loan which Herman negotiated and for which she was subsequently sued

because the loan was not used by her, and other items. The proceeds of the prorating money were never given to claimant. Nevertheless Herman charged attorney's fees for services which were not rendered for her benefit. Upon this state of facts and after his death claimant filed in the Probate Court of Cook County a claim against the administratrix of Herman's estate which was allowed in the sum of $2533.21. Upon appeal to the Circuit Court the case was tried de novo, and the claim was allowed in the sum of $2338.38; the administratrix appeals from this award.

The receipt by Herman from claimant of $11,701.24 is admitted, as is the return of $11,347.15 of claimant's money. The dispute arises as to several items in the claim which were withheld by Herman in closing the transaction. The first of these is a survey fee amounting to $50.00 which was not considered by the court as part of the claim allowed. Next is an item of $200.00 claimed as attorney's fees. It is true that under the original memorandum of agreement $200.00 of the $11,701.24 paid by claimant to Herman was to be applied toward Herman's fees, but inasmuch as the services rendered by Herman did not inure to claimant's benefit, the property not having been conveyed to her but sold to a third person, the estate should be surcharged with this sum. An item of $555.73 represents net prorating money retained by Herman. In a letter dated July 22, 1943 Herman listed

three items aggregating $555.73, admitted to have been collected by him from one Biossat, as follows: (1) $13.33 from the Chicago Title and Trust Company, refund of over-deposit; (2) check in the sum of $121.00 from Jacob Rothschild, the vendor of the property, being the balance of July 1943 payment on the contract; and (3) $421.40, being another check from Rothschild for balance on "tax deposits return." The context of this letter indicates that Herman admitted that the net prorating money was due claimant, although he does not specifically say so, but he claimed it as attorney's fees and balance to be applied on the purchase price. Since claimant never acquired the property it seems to us that she is clearly entitled to this item. There follows an item of $75.00 advanced for costs in the so-called McLeod foreclosure. Counsel for the administratrix state in their brief that "there is no explanation in the record of this receipt. There is no evidence that the additional $50.00 was ever paid to Mr. Herman." However, Herman signed a receipt in evidence which evidently represented "total advanced $75.00 for costs." This is sufficient proof of the item, and it should be allowed. The next item is for commission to one Baron for making a mortgage. Because of Herman's failure to convey the real estate to claimant she could not of course use the proceeds of the loan, and was sued for the commission by the broker who arranged it. A judgment of $440 was entered against her, which was satisfied

by payment of $200. She was entitled to recover this sum. An item of $100 attorney's fees is in the same category as the $200 item. The transaction was not completed for claimant, and accordingly she is entitled to the return of this sum. The court added to these items the sum of $1216.24, being interest on the money for fifteen months, because of vexatious delay. We think this item should not have been allowed.

In summary, the claim as allowed in the Circuit Court for $2338.38 should be reduced by $1216.24, leaving an aggregate of $1122.14. Accordingly the judgment of the Circuit Court is reversed, and judgment is entered here against the administratrix and in favor of claimant for $1122.14.

Judgment reversed and judgment here.

Schwartz, P. J., and Scanlan, J., concur.

by payment of $200. She was entitled to recover this sum. An item of $100 attorney's fees is in the same category as the $200 item. The transaction was not completed for claimant, and accordingly she is entitled to the return of this sum. The court added to these items the sum of $806.98, being interest on the money for fifteen months, because of vexatious delay. We think this item should not have been allowed.

In summary, the claim as allowed in the Circuit Court for $2338.38 should be reduced by $806.98, leaving an aggregate of $1531.40. Accordingly the judgment of the Circuit Court is reversed, and judgment is entered here against the administratrix and in favor of claimant for $1531.40.

Judgment reversed and judgment here.

Schwartz, P. J., and Scanlan, J., concur.

45297

BEN ROIN t/a ACTIVE TIRE AND RADIO CO., Appellee, v. JOHN LEWIS, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff instituted an action to recover for certain merchandise sold and delivered to defendant. Defendant was defaulted and judgment entered in favor of plaintiff. Defendant appeals.

April 14, 1950 an alias summons was issued by the Clerk of the Municipal Court of Chicago. The return made by the bailiff of the Municipal Court states that he served defendant by delivering a copy of the summons to Mrs. J. Lewis, wife of the defendant, on April 15, 1950, and that on April 18 a copy of the writ was mailed together with a statement of claim, addressed to defendant at his usual place of abode. April 28, 1950 defendant filed a "special and limited appearance" for the purpose of quashing the service of summons. On that day an order was entered by Judge Edward Scheffler granting defendant five days in which to file an affidavit in support of his motion to quash the service.

Pursuant to notice defendant's counsel appeared at two o'clock p.m. on May 3rd and moved for an extension

of time in which to file an affidavit in support of his motion to quash. At that time Judge Quilici entered an order which reads: "Rule on Defendant to file affidavit in support of motion to quash service instanter. Now comes the defendant in this cause and moves the Court to quash service and special appearance which motion the Court overruled, and it is ordered that a rule be entered on defendant to file general appearance instanter. It is ordered by the Court that leave be and the same is hereby given to defendant to extend time to file defense within five (5) days and re-set for trial May 31st, 1950 - top of call."

Defendant having failed to file a general appearance and defense as required by the order of May 3rd, judgment was entered in favor of plaintiff.

May 31, the day on which the judgment was entered, defendant filed a sworn petition averring in substance that the order entered by Judge Scheffler, allowing him five full days to file his affidavit in support of his motion to quash, did not expire until the end of the day on May 3rd; that defendant would have filed an affidavit in support of his motion within the period allowed, stating that Mrs. John Lewis, upon whom summons was served, had been divorced from defendant several years ago; and that she did not reside with defendant as husband and wife, and that defendant had a separate residence.

Defendant's sole contention is that he had a right to rely on the order entered by Judge Scheffler on

April 28, 1950 allowing him five days to file his affidavit in support of his motion to quash. In our view the order entered by Judge Scheffler at the time defendant filed his special appearance was reasonable. When defendant appeared early on the afternoon of May 3rd the only matter presented to the court by defendant's motion was whether an extension of time for filing his affidavit in support of his motion to quash should be allowed. Instead of ruling on defendant's motion for an extension of time the court directed him to file an affidavit in support of his motion instanter, thus reducing the time allowed defendant by Judge Scheffler's order. By filing a special appearance defendant challenged the jurisdiction of the court. That issue could not be disposed of under the terms of Judge Scheffler's order of April 28, 1950 until after May 3rd.

We are impelled to hold that the trial court erred in entering the order of May 3, 1950, when the defendant's time for filing his affidavit in support of his motion to quash had not yet expired, and entering the judgment order May 31, 1950.

For the reasons stated, the judgment is reversed and the cause is remanded for further proceedings not inconsistent herewith.

REVERSED AND REMANDED FOR
FURTHER PROCEEDINGS.

BURKE, P. J., AND WILLY, J., CONCUR.

45349

ANNIE FITZGERALD, Appellant,	)	APPEAL FROM
v.	)	CIRCUIT COURT
JACK REVILLE, Appellee.	)	COOK COUNTY.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is an action to recover damages for personal injuries alleged to have been sustained by plaintiff when she was struck by defendant's automobile while walking in a crosswalk at a street intersection. Trial by jury resulted in a verdict of not guilty. Plaintiff's motion for new trial was overruled and judgment entered accordingly. Plaintiff appeals.

The accident occurred about four o'clock in the afternoon on September 2, 1946 at the intersection of 33rd and Wallace streets in the City of Chicago. Wallace Street, which runs north and south, is a through street protected by stop signs, and in the center has north and south bound street car tracks. Defendant was driving his Ford two-door sedan west on 33rd Street. When he reached Wallace Street he stopped his car and then proceeded to make a left turn into Wallace Street. At that time plaintiff was standing in the crosswalk on the south side of 33rd Street at the west curb of Wallace Street intending to walk east on the south side of 33rd Street toward her home. When she reached the westerly rail of the southbound street car tracks she alleges that she was struck by defendant's car, causing the injuries complained of.

Defendant was accompanied by a neighbor, John Kerekes, and their respective sons both aged twelve. Kerekes sat in the front seat of the car beside the defendant and the boys sat in the rear seat. Defendant's testimony tends to show that there was no impact upon plaintiff's person.

Plaintiff's principal contention is that the verdict and judgment are against the manifest weight of the evidence.

Plaintiff, 67 years of age, testified that on the day of the occurrence she left her home and walked west to mail a letter at the southwest corner of 33rd and Wallace Streets. Returning to her home she walked to the west curb of Wallace Street where she stopped and looked north and south for traffic; that she also looked east "where I was going to cross Wallace Street"; that when the street was cleared of traffic she walked to the west rail of the southbound street car tracks in Wallace Street where she was struck by defendant's car "in the back of the leg"; "I did not see what it was that hit me at any time before this accident."

On cross examination plaintiff admitted that before the accident "she did not see any car at all," and that there was nothing to obstruct her view "of anything that was on the street."

Defendant testified in substance that when he reached the intersection of Wallace Street he stopped for a minute and a half or two minutes because there was traffic going north and south on Wallace Street; that when the traffic was clear on Wallace Street he did not see any pedestrians in

the vicinity; that he proceeded west on 33rd Street until he reached the west street car tracks on Wallace Street where for the first time he saw plaintiff standing on the west curb of Wallace Street; that at that time his car was still about eighteen or twenty feet north of the south crosswalk, and that his car was traveling about five miles an hour; that when plaintiff started "to hurry across the street" he applied the brakes and his car came to a stop almost immediately, "stopping about one foot south of the north edge of the crosswalk"; and that plaintiff got within "a couple of feet of my front fender when I stopped completely."

Defendant further testified that when plaintiff was within four or five feet from defendant's car she fell; that his automobile did not come in contact with the plaintiff; and that after the plaintiff fell the witness took her to the police station in his car and thereafter drove her to the hospital.

John Kerekes, an electrical engineer, testified that he was a neighbor of the defendant and was riding in his car at the time of the accident; that when they reached Wallace Street the car stopped for the stop sign and then slowly turned the corner south on Wallace Street; that the turn was made at approximately five miles an hour; that he saw plaintiff standing on the west curb of Wallace Street when defendant's automobile stopped for the stop sign; that plaintiff was standing on the southwest corner facing east and appeared to be ready to step off the curb; that defendant's car slowly turned the corner and was approximately seven or eight feet from the crosswalk at the time the witness saw the plaintiff move.

Kerekes also testified that plaintiff "more or less hurried across the street"; that he cautioned defendant to "be careful"; that defendant's car did not get in contact with the plaintiff; that as defendant's car neared the plaintiff she threw her arms up and made two or three steps to the south and then turned to the west when she stumbled and fell; that at the police station the witness looked at the defendant's car and the police in his presence also examined defendant's car for any dust "that had been brushed off" and that no dust had been disturbed on the car.

Neither of the boys in the rear seat of defendant's car witnessed the occurrence.

Plaintiff insists that under the circumstances shown by the evidence defendant's duties are defined by section 74 (A) Motor Vehicle Act, section 171, chapter 95½, Illinois Revised Statutes 1945 relating to pedestrians' right-of-way at crosswalks, and section 162, chapter 95½, Illinois Revised Statutes 1945, which provides that "no person shall turn a vehicle from a direct course upon a highway unless such movement can be made with reasonable safety and then only after giving a clearly audible signal by sounding a horn * * *."

It is uncontroverted that on the day of the accident the visibility was good and that there were no obstructions preventing plaintiff from seeing defendant's car in making the left turn at the intersection. In Moran v. Gatz, 390 Ill. 478, the court in construing section 74 (A) said, at page 486, that "the right-of-way statute does not give to pedestrians on a crosswalk the right-of-way over all

vehicles on the street under any and all circumstances; each case must be considered in the light of the facts and circumstances surrounding it; the pedestrian's right-of-way is not absolute because both he and the vehicle happen to be on the street at the same time". There is evidence tending to prove that defendant's car had entered Wallace Street and become part of the southbound traffic before the plaintiff left the west curb. Whether under these circumstances plaintiff was guilty of contributory negligence presented a question of fact for the jury.

With respect to defendant's alleged violation of section 162, chapter 95½, Motor Vehicle Act, since there is no evidence tending to prove that defendant turned his car from a direct course after plaintiff stepped into Wallace Street from the west curb, this section of the statute would not be applicable in the instant case.

We think the jury could find that defendant's automobile did not strike plaintiff. Determination of the probative value of the evidence and the conclusions to be drawn from it lies within the province of the jury. (Lazarus v. Friel, 331 Ill. App. 552.) From a careful reading of the record we are of the opinion that the verdict of the jury was not contrary to the manifest weight of the evidence.

Criticism is leveled at defendant's given instructions numbers 12 and 6. Instruction number 12 reads: "You are instructed that if you find from the evidence that, at and before the time of the occurrence complained of, the defendant was exercising ordinary care, and that while the

defendant was doing so, if he was, the plaintiff, suddenly and unexpectedly proceeded from a position of safety into a place of danger; then, in order to charge the defendant with a duty to avoid injuring the plaintiff, the plaintiff must show, by a preponderance or greater weight of the evidence that the circumstances were of such character that the defendant had a reasonable opportunity in the exercise of ordinary care, to become conscious of the facts giving rise to such duty, and a reasonable opportunity, in the exercise of ordinary care, to perform such duty." Plaintiff says that the undisputed testimony shows that she was on the south crosswalk of Wallace Street and was attempting to cross the street at a place where the law gives her the right-of-way over automobile traffic. As heretofore stated, defendant's evidence shows that plaintiff remained standing at the curb until after defendant's car had made the left turn and traveled directly south to within seven or eight feet of the north edge of the crosswalk, when she "hurried across the street." Similar instructions were approved in Chicago Union Traction Co. v. Browdy, 206 Ill. 615, and in the recent case of Goldschmidt v. Chicago Transit Authority, 335 Ill. App. 461. We think the instruction was proper.

Plaintiff complains that defendant's given instruction number 6 is defective because it is verbose and repetitious. The instruction recites the averments of the answer and is not unlike plaintiff's instruction number 3 in which she attempts to define the issues by reciting the allegations of the complaint. In our view defendant's instruction number 6 is subject to criticism but it does not warrant us

in reversing the judgment. Moreover, since plaintiff's instruction number 3 is open to the same criticism as defendant's given instruction number 6, she cannot be heard to complain. (William Wrigley Jr. Co. v. Standard Roofing Co., 325 Ill. App. 210; Bellomy v. Bruce, 303 Ill. App. 349.)

For the reasons given, the judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. AND KILEY, J., CONCUR.

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Abs Pl. 9

194 A

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

Act

February Term, A. D. 1951

General No. 9718

Agenda No. 4

THOMAS FITZGIBBONS, Plaintiff-Appellant, vs. ALLEN RUE, Defendant-Appellee.	Appeal from Circuit Court of Jersey County

Statute 12

O'Connor, P.J.

Plaintiff-appellant Fitzgibbons, a pedestrian, was struck and injured by defendant-appellee Rue's truck on February 2, 1945 on Highway 67, seven miles south of Jerseyville, Illinois. The parties will be referred to as plaintiff and defendant hereinafter.

In the lawsuit which ensued as a result of this accident Count I of plaintiff's second amended complaint, alleged that defendant was negligent in that he violated Sections 115, 114, and 49 of the Uniform Act Regulating Traffic on Highways of the State of Illinois (Ch. 95½, Secs. 114, 115, 49, Illinois Revised Statutes) relating to brakes, sounding a horn, and excessive speed. Count II of the second amended complaint charged wilful and wanton misconduct in general terms, in failing to keep a proper lookout, and in violating Sec. 49 of the Uniform Act relating to speed aforesaid. The defendant denied all the material allegations of plaintiff's complaint and the parties proceeded to trial before a jury in the Circuit Court of Jersey County.

The evidence can be briefly stated. The plaintiff testified that his son was ill and that one Emerick gave him a ride on the running board of his truck to the nearest telephone, so that he might call a doctor. Plaintiff rode on the right hand running board of Emerick's truck, which was traveling south. When the truck stopped he got off and went around the back end of the truck. As he stepped onto the road he saw the defendant's truck about 225 feet down the road, traveling toward him. He then ran across the road and the defendant's truck hit him. The plaintiff also testified that he had been hard of hearing for the past twenty-five years.

There was evidence that there was a pool of blood in the highway; that there were drops of blood extending along the road about 50 feet north of the pool; that the fender of the defendant's truck, on the right hand side "coming from the back" had a dent; and that there was a dent in the hood of the truck.

The defendant testified that he first saw the plaintiff when his truck was even with Emerick's truck, that he was not going over 35 miles per hour, that Fitzgibbons ran in front of him and that he did not have time to honk his horn, although he did apply his brakes before striking the plaintiff with the left front part of his truck. The point of impact, according to defendant's testimony, was 3 to 4 feet behind Emerick's parked truck and close to the center of the road, and defendant further stated that he traveled but 25 to 30 feet before he stopped.

Emerick, called on behalf of the defendant, testified that he saw plaintiff running across the road with his head down, saw defendant's truck approaching, shouted at the plaintiff who failed to hear him, and that he saw the plaintiff run into the side of the defendant's truck. Emerick testified that his truck was parked off the road.

Charles Rue, the father of the defendant, testified that 6 or 7 weeks after the accident he had a conversation with the plaintiff who said, when speaking of the accident, "It was my own fault. I never looked either way, I just ran in front of him". Plaintiff denied making these statements.

At the close of the plaintiff's evidence the trial judge directed a verdict for the defendant on Count II. The jury found the defendant not guilty on Count I. Plaintiff's motion for new trial was denied by the trial judge and judgment was entered that the plaintiff take nothing by his suit and pay costs. From that judgment this appeal is prosecuted.

The plaintiff contends that the number of instructions given by the defendant were excessive in number and needlessly repetitious, with phraseology favorable to the defendant, tending to persuade the jury that the views held by the court were in favor of the defendant. Plaintiff cites Baker v. Thompson, 337 Ill. App. 327, and Chism v. Decatur Newspapers, Inc., 340 Ill. App. 42, to support him in this regard.

This court is in full accord with the principles enunciated in those cases as applied to the facts in those cases. Suffice it to say that in the Baker and Chism cases, supra, the facts and the number and type of instructions given by the defendant are easily distinguishable from the facts and instructions in the case before us, and hence those decisions are not controlling here.

The instructions in this case were not excessive in number, especially repetitious, nor could they have confused the jury so as to be prejudicial to the plaintiff's case.

The plaintiff urges that the trial court erred in giving instruction Number 11, reading as follows:

"The Court instructs the jury that the fact that Fitzgibbons was a pedestrian, and that Rue was driving a truck which struck and injured Fitzgibbons, does not alone, without other factors, make Rue liable for damages or cast upon Rue the burden of proving that he was not liable. Before there can be liability the driver of the truck must have been guilty of negligence which was the proximate cause of the injury, and the pedestrian on his part must have been free from negligence which contributed to the injury, and the burden is upon the plaintiff to prove these factors by a preponderance of the evidence,"
and insists that the instruction gave undue prominence to one certain fact or circumstance, and that it was misleading and argumentative. With this we cannot agree. The instruction correctly states the law under the facts in this case, does not give a certain fact any undue prominence, is not misleading nor argumentative, and clearly told the jury what elements of proof were necessary on which to base a recovery.

The plaintiff also contends that the court erred in giving an instruction couched in the language of Chapter 95½, Section 172 of the Illinois Revised Statutes, without embodying in that instruction the qualification of Sub Section (d) of Section 172. Plaintiff contends that such failure is reversible error, and cites Breitmeier v. Sutera, 327 Ill. App. 221, to sustain his position. The opinion in that case is published in abstract form but an examination of the full opinion discloses that the court reversed the judgment for the defendant because of certain errors in cross-examination of a witness, and hence that decision cannot be decisive of this case. Sub Section (d) of the statute in question provides as follows:

"Notwithstanding the provisions of this section every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give warning by sounding the horn when necessary and shall exercise proper precaution upon observing any child or any confused or incapacitated person upon a roadway."

The language of this provision of the statute could well be used in an instruction in a case where the driver of the vehicle had an opportunity to see the pedestrian. Such was not true in the instant case. The record clearly shows that the defendant had no opportunity to observe the pedestrian, and that statute could have no application in this case. Furthermore, the court did instruct the jury that it was the duty of the defendant, at and before the injury complained of, to drive his truck with ordinary care and at a reasonable speed, obeying the requirements of the law and the regulations for the operation of his truck, which was certainly the correct statement of the law under the facts in this case.

Considering the instructions as a series, the jury was properly instructed as to the law applicable to the facts in this case, the verdict and judgment was properly rendered consistent with the evidence, and it appears that substantial justice has been done, and this court accordingly will not reverse the judgment of the court below. Palmer v. Miller, 310 Ill. App. 582; Minnis v. Friend, 360 Ill. 328.

In view of the fact that the judgment is the only one that could be properly rendered consistent with the evidence and law in this case, it will not be necessary to discuss the points raised by the defendant in regard to the sufficiency and the waiver and abandonment of the motion for a new trial.

There being no error in the record, the judgment of the trial court is accordingly affirmed.

Affirmed.

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

February Term, A. D. 1951

General No. 9723 | Agenda No. 7

BRUCE GRAVES and EUGENE FARMER, Plaintiffs-Appellants, vs. JULIUS V. SPANN and GORDON'S TRANSPORTS, INC., a Corporation, Defendants-Appellees.	Appeal from Circuit Court of Champaign County
# # #	
JULIUS V. SPANN, Counterclaimant-Appellee, vs. BRUCE GRAVES, Counterdefendant-Appellant.	

O'Connor, P.J.

The plaintiffs-appellants, Bruce Graves and Eugene Farmer, brought an action against the defendants-appellees, Julius V. Spann and Gordon's Transports, Inc., a corporation, for damages which they sustained in an automobile collision. The accident occurred on March 10, 1949 on U. S. Route Number 45, approximately three miles south of the city limits of the City of Champaign, Illinois.

The defendant-appellee, Gordon's Transports, Inc., a corporation, filed an answer and the defendant-appellee, Julius V. Spann, filed an answer and a counterclaim.

At the close of the evidence introduced by the plaintiffs-appellants, the defendants-appellees moved for a directed verdict, which motion was overruled, and at the close of all the evidence the plaintiffs-appellants moved for a directed verdict as to the counterclaim, and the defendants-appellees moved again for a directed verdict as to the complaint, which motions were overruled.

The jury found against the plaintiffs-appellants and found in favor of the counterclaimant-appellee, Julius V. Spann, and fixed his damages at $2500.00. A written motion for judgment notwithstanding the verdict, or in the alternative for a new trial was filed on behalf of Bruce Graves and Eugene Farmer, which motions were overruled by the Circuit Court. From that judgment overruling the motion for a new trial, and finding a judgment in favor of the counterclaimant-appellee, the plaintiffs-appellants, Bruce Graves and Eugene Farmer, prosecute this appeal.

The plaintiffs-appellants, Bruce Graves and Eugene Farmer, were traveling south on a highway in a Buick passenger automobile being driven by Bruce Graves. A tractor trailer unit, the property of the defendant-appellee Gordon's Transports, Inc., a corporation, was being driven northerly by the defendant-appellee Julius V. Spann, an employee of Gordon's Transports, Inc., a corporation. The highway upon which the drivers were traveling was a paved two-lane public highway, twenty-four feet in width. It was about two A.M. on March 10, 1949. The weather was snowy and wet and the visibility very poor. The line indicating the center of the highway was not visible because of the snow that had fallen and was still on the highway.

Three of the parties to the suit are the only occurrence witnesses. Both plaintiffs-appellants and defendants-appellees rely on the testimony of the persons who saw the position of the vehicles after the collision and the tire marks in the snow at the scene, to establish that they were on their proper sides of the highway at the time of the accident. However, no useful purpose will be served by reviewing here the testimony of the witnesses as to this particular point. It is sufficient to say that the plaintiff-appellant Farmer is uncertain as to what occurred just prior to the collision, as he was in the process of lighting a cigarette by using the electric cigarette lighter of the automobile, and was being assisted in the procedure by the plaintiff-appellant Graves just immediately prior to the collision. And the drivers of the two vehicles are in direct contradiction of one another as to their location on the highway. To decide the right and wrong of this case without the aid of personally observing the witnesses as they gave their testimony, one would be so handicapped that he might well have flipped a coin to select the victor. The jury had seen the witnesses as they heard the testimony, an advantage which this court does not have. Of necessity the appearance of these witnesses on the stand is invaluable in determining where the weight of the evidence lies, and under the circumstances the finding of the jury on this point should not be disturbed. DeFrates v. Rowland, ~~May 22, 1950~~ 341 Ill. App. 69; Chevalier v. Seager, 121 Ill. 564; Antosz v. Goss Motors, Inc., 311 Ill. App. 254; Smith v. Courtney, 281 Ill. App. 530.

The Smith case, supra, also involved a collision of vehicles traveling in opposite directions, and there the court said on page 535:

"It was for the jury to say whose evidence they would believe as true and since they have adopted the evidence of the plaintiff as being the more credible and the same having been approved by the trial court, this

court would not be warranted in reversing the judgment on the grounds that the verdict was not supported by a preponderance of the evidence."

Of the three instructions complained of by the plaintiffs-appellants, we consider Instruction No. 26, which requires the plaintiffs-appellants to "establish his case" rather than "prove his case", to be in very bad form. The word "establish" places a higher burden than the law contemplates upon the plaintiffs-appellants, and it should not have been used. Hurzon v. Schmitz, 262 Ill. App. 337.

In the Hurzon case, supra, this error, coupled with other erroneous instructions, necessitated a reversal. Such is not true in this case. The jury was otherwise well instructed and the same result is not necessary here.

Instruction No. 19 is as follows:

"You are instructed that if you believe from the evidence that the plaintiff, Bruce Graves, and the defendants were both guilty of negligence which proximately contributed to the injuries or damage complained of, then you are instructed that you have no right to compare the negligence of the plaintiff with that of the defendant, and find a verdict according to which side you think was guilty of the greater degree of negligence, for in such case it is the law that it makes no difference which was guilty of the greater degree of negligence. Under such circumstances, the said plaintiff cannot recover."

As the plaintiffs-appellants claim that to give this instruction was erroneous on the theory that it instructed the jury on the doctrine of comparative negligence, which doctrine is not the law in Illinois, it appears to us that if this instruction is one on the doctrine of comparative negligence,

it also explains to the jury that such is not the Illinois law and that they have no right to follow it; and we can see that the plaintiffs-appellants have suffered no harm by the giving of this instruction, especially in view of the fact that there is a counterclaim filed here and the same rule would be applicable to the counterclaim of the counter-claimant-appellee.

The other instruction complained of by the plaintiffs-appellants refers to the duty of a guest in exercising due care and caution for his own safety and is not subject to attack under the facts in the instant case.

We find no reversible error in the record and the judgment of the Circuit Court of Champaign County is affirmed.

Judgment affirmed.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

February Term, A. D. 1951

General No. 9745

Agenda No. 22

OWEN GAFFNEY and TOM O'CONNELL, as Conservator of the Estate of Owen Gaffney, an incompetent, Plaintiffs-Appellants, vs. ROBERT E. HARMON, Defendant-Appellee.	Appeal from Circuit Court of Morgan County

342 I.A. 714

O'Connor, P.J.

The defendant-appellee, hereinafter called the defendant, is a practising attorney, and the plaintiff-appellant, hereinafter called the plaintiff, was his client. A suit in equity was brought in the Circuit Court of Morgan County to require the defendant to reconvey to the plaintiff a certain farm which the defendant had obtained from the plaintiff, his client, while the fiduciary relationship between the attorney and client existed. The suit also required the defendant to account for rents collected from the farm during the years that he had held the title. The Circuit Court held that the defendant was a constructive trustee and ordered him to reconvey the farm to the plaintiff and to account for the rents. This decree was affirmed by the Supreme Court in Gaffney v. Harmon, 405 Ill. 273. The Circuit Court then ordered the defendant to account. The plaintiff filed objections to some of the items in the account, and an order was entered by the Circuit Court sustaining the objections in part

and overruling them in part, and finding that the defendant was indebted to the plaintiff in the amount of $14,916.86.

The Circuit Court allowed the defendant a credit of $1,164.89 as compensation for services as trustee and allowed an item in his account in the amount of $431.55 for pulling hedge and for labor.

This appeal is taken by the plaintiff from the order overruling his objections to those two items in the account.

It has frequently been held both by the Supreme Court and by the various appellate courts of this State that a fiduciary who wrongfully claims title to the trust property adversely to his beneficiary is not entitled to any compensation for his services in the management of said property. Lehmann v. Rothbarth, 159 Ill. 270; Stone v. Farnham, 47 Atl. 211, 22 R.I. 227; Fuller v. Abbe, 105 Wisc. 235, 81 N.W. 401; Continental Illinois National Bank + Trust Co. of Chicago v. Kelley, 333 Ill. App. 119, 127.

If this were not so, it would encourage fiduciaries to deal with their trust adversely to the interests of their beneficiaries, and it is a well established policy of the law that a trustee should not be permitted to profit by breach of his trust.

Defendant cites no case in support of his position except this case in the Supreme Court, Gaffney v. Harmon, supra. He states that the Supreme Court has already held that the defendant is entitled to compensation for his services as trustee. With this we cannot agree. The issue as to the right of the defendant to such compensation was not before the Supreme Court in the earlier appeal, and the paragraph of the opinion dealing with the right of the defendant to reimbursement for his expenditures and a reasonable compensation for his services refers to his right of reimbursement for his services that were rendered by him as an attorney prior

to the time that he acquired the title to the property adversely to the interests of his client. It is not disputed that he has claimed credit for, and has been allowed a sum in full compensation for his legal services rendered and expenses incurred prior to the time he acquired the property.

The courts should jealously guard and protect the relationship of attorney and client, and never allow an attorney to profit by virtue of his violating his breach of fiduciary relationship to his client.

However, we believe that the trial court was correct in allowing the item of $431.55 expended by the defendant for pulling a hedge and for labor. Regardless of whether the plaintiff owned a life estate or an estate in fee, the evidence showed that the removal of the hedge increased the productivity of the property and thus was a benefit to both the life estate and the fee estate.

This cause is reversed and remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

February Term, A.D. 1951

General No. 9722. Agenda No. 6.

LEROY CAUTHLER, Plaintiff-Appellee, -vs- PARKS LAWN WORKS, INC., a Corporation, Defendant-Appellant.	Appeal from the County Court of Macon County, Illinois.

DADY, J:

On November 1, 1949, plaintiff-appellee started this suit in a justice of the peace court. Plaintiff appealed to the county court from a judgment entered in justice court.

At the conclusion of a trial, without a jury, the county court entered judgment for $238.00 and costs in favor of plaintiff and against defendant. Defendant brings this appeal from such judgment.

At all times in question Chris Hansen was president of defendant company and in charge of its plant in conjunction with Henry Vogt.

Shortly before January 3, 1949, plaintiff and a representative of defendant had conversations concerning plaintiff being thereafter employed by the defendant.

On January 3, 1949, an instrument in writing was executed by defendant, by said Hansen, which read as follows:

STATE OF ILLINOIS
CIRCUIT COURT
THIRD DISTRICT

February Term, A.D. 1949

General No. 8728.

Madison Co. C.

HENRY VAUTRIN,

Plaintiff-Appellee,

-vs-

PAULINE LA I SON P, Inc.,
a Corporation,

Defendant-Appellant.

Appeal from the
County Court of Madison County,
Illinois.

MR. JUSTICE [illegible] delivered the opinion of the court:

On November 1, 1948, plaintiff-appellee recovered this suit in a justice of the peace court. Plaintiff appealed to the county court from a judgment entered in justice court.

At the conclusion of a trial, without a jury, the county court entered judgment for [illegible] in the sum of $[illegible] and against defendant. Defendant prosecutes this appeal from such judgment.

At all times in question Orville [illegible] was president of defendant corporation and in charge of its plant in cooperation with Henry Vogt.

Shortly before January 3, 1949, plaintiff and [illegible] representative of defendant had conversations concerning plaintiff being thereafter employed by the defendant.

On January 3, 1949, an instrument in writing was executed by defendant, by said [illegible], which read as follows:

"CONTRACT AGREEMENT BETWEEN FARIES LAMP WORKS, INC. AND LEROY C. GAUTHIER from January, 1949 to January 1953.
This will confirm our conversation and agreement whereby we agree to give you steady employment for a period of five years and you agree to work for us for a period of five years in the following capacity:
"To operate our plating, polishing and any other department you are capable of operating at a minimum salary of $100.00 per week. **.
"I, LeRoy C. Gauthier, will do everything possible to promote the interests of the Faries Lamp Works, Inc. during the period of this agreement."

One copy of such instrument was then given by defendant to plaintiff and one copy was retained by defendant.

Decendant contends this suit cannot be maintained on the "contract agreement," claiming the instrument was not signed by plaintiff. Plaintiff testified that the copy of the agreement retained by defendant was also signed by plaintiff, but that the copy retained by plaintiff was not signed by him. Whether the copy retained by defendant was signed by plaintiff was a question of fact. The trial court, in effect found it was signed by plaintiff. It is our opinion we should not disturb such finding.

Pursuant to said agreement and about January 6, 1949, plaintiff went to work for defendant and continued such work until October 12th or 13th.

Plaintiff testified that about October 12th he had a talk with Henry Vogt, works manager of the defendant, in which he told Vogt about plaintiff's work being interfered with, and told Vogt "something would have to be done about it," meaning thereby that if plaintiff was to continue to run his department plaintiff would have to run it, that Vogt then said that plaintiff was to talk with Vogt that afternoon, but that in the afternoon the

"CONTRACT AGREEMENT BETWEEN [illegible], INC. AND LABOR [illegible] from January [illegible] to January 1953.

"We will confirm our [illegible] and agreement whereby we agree to give you steady employment for a period of five [illegible] years to work for us for a period of five years in the following capacity:

"To operate our [illegible], notwithstanding any other agreement you may [illegible] or operation of [illegible] minimum salary of $[illegible] per week.

"1. Labor U. Gaulden, will in everything possible to promote the interests of the [illegible] company.

"2. During the period of this agreement [illegible]

One copy of such instrument was then given by defendant to plaintiff and one copy was retained by defendant.

Defendant contends this suit cannot be maintained on the "contract agreement," claiming the instrument was not signed by plaintiff. Plaintiff certified that the copy of the agreement retained by defendant was also signed by plaintiff, but that the copy retained by plaintiff was not signed by him. Whether the copy retained by defendant was signed by plaintiff was a question of fact. The trial court, in effect found it was signed by plaintiff. It is our opinion we should not disturb such finding.

Pursuant to said agreement and about January [illegible], 1953, plaintiff went to work for defendant and continued such work until October 15th or 16th.

Plaintiff testified that about October 15th he had talk with Harry Voit, works manager of the defendant, in which he told Voit about plaintiff's work being interfered with, and told Voit "something would have to be done about it," meaning thereby that if plaintiff was to continue to run his department plaintiff would have to run it, that Voit then said that plaintiff was to talk with Voit that afternoon, but that in the afternoon the

plaintiff could not find Vogt, that the next morning after the plaintiff went to work Vogt came to him and said, "I thought you quit," and plaintiff said, "No, I didn't quit, we were to talk yesterday afternoon but we didn't," that Vogt then said, "You can finish out the rest of the day, but today is all," and plaintiff then told Vogt, "If I am being fired I will leave now," and Vogt said, "To night is the end of it."

Vogt, as a witness for defendant, testified that the work produced in plaintiff's department was not satisfactory, so in September defendant employed an inspector to cover the work while it was coming off the machines, that thereafter plaintiff complained about the inspector, that Vogt had many conversations with plaintiff about "rejects" of work done in plaintiff's department, that on the morning of October 11th plaintiff told Vogt he was going to quit, that Vogt then told plaintiff he could work the day out and get a full day's pay, and that plaintiff did work all of that day, that on October 12th he saw plaintiff at work and told plaintiff he thought plaintiff had quit, that plaintiff then said he had not quit, and said, "Then I am fired," and Vogt said, "You are not fired, you quit yesterday," and plaintiff then said he was going to leave and go to town. Vogt further testified that plaintiff made no claim for further pay for the month of July until this suit was brought.

Harold Reed, an employee of defendant, testified that the day plaintiff left the plant he told the witness, "I am going to leave, I quit, I am not putting up with it." This conversation was denied by plaintiff.

plaintiff could not find Voegt, that the year commence after the plaintiff went to work Voegt came to him and said, "I thought you quit," and plaintiff said, "No, I didn't quit, I came to work yesterday afternoon but we didn't," that Voegt then said, "You can finish out the rest of the day, for today is all," and plaintiff then told Voegt, "If I am laid off I will leave now" and Voegt said, "To night is the end of it."

Voegt, as a witness for defendant, testified that the work produced in plaintiff's department was not satisfactory, so in September defendant employed an inspector to move the work while it was coming off the machines, that thereafter plaintiff complained about the inspector, that Voegt had many conversations with plaintiff about "rejects" of work done in plaintiff's department, that on the morning of October 11th plaintiff told Voegt he was going to quit, that Voegt then told plaintiff he could work the day out and get a full day's pay, and that plaintiff did work all of that day, that on October 12th he saw plaintiff at work and told plaintiff he thought plaintiff had quit, that plaintiff then said he had not quit, and said, "Then I am fired," and Voegt said, "You are not fired, you quit yesterday," and plaintiff then said he was going to leave and go to town. Voegt further testified that plaintiff made no claim for further pay for the month of July until this suit was brought.

Harold Reed, an employee of defendant, testified that the day plaintiff left the plant he told the witness, "I am going to leave, I quit, I am not putting up with it." This conversation was denied by plaintiff.

Whether plaintiff was unjustly discharged or voluntarily quit was a question of fact for the trial judge to pass on. It is our opinion we can not properly hold the finding in effect that defendant was unjustly discharged is contrary to the manifest weight of the evidence.

As to moneys claimed by plaintiff to be due him, he testified that in July the factory shut down for two weeks to take inventory, that he received only one week's pay for such two weeks, and that there was $100.00 still due him for the other week of such shut down period. He further testified that the day after he was discharged he received from defendant a check for $38.00 and that from the time he was discharged on October 12th until the commencement of this suit on November 1st he was out of employment.

Defendant now contends that such evidence does not justify a judgment for $238.00, stating that the bill of particulars filed by plaintiff claimed only $200.00 due. As a matter of fact the bill of particulars stated that the amount due was "$100.00 in pay due from the month of July," and "$200.00 representing two weeks pay due him at the time this suit was filed."

It is our opinion that such evidence would have justified the trial court in finding there was due plaintiff at the commencement of this suit $100.00 for the week he was not paid in July, and damages at $100.00 per week from October 12th to November 1st, less $38.00, which would have amounted to more than $238.00. Therefore such evidence justified the judgment in question.

The judgment of the trial court is affirmed.

Affirmed.

Whether plaintiff's [illegible] wrongfully discharged [illegible] voluntarily quit was a question of fact for the trial court [illegible]. In our opinion we can not properly notice the finding [illegible] that defendant was unjustly in default [illegible] weight of the evidence.

As to damages claimed [illegible] that in duly the factors that [illegible] that he received only one [illegible] there was $100.00 still due him for [illegible] down period. He further testified [illegible] discharged he received from defendant a check for $8.00 [illegible] from the time he was discharged [illegible] ment of this suit on November [illegible]

Defendant not denied [illegible] a judgment for $250.00, plaintiff [illegible] filed by plaintiff claimed only $100.00 [illegible] the bill of particulars stated that the amount [illegible] in pay due from the week of June, [illegible] weeks pay due him at the time [illegible]

It is our opinion that such evidence [illegible] the trial court in finding there was [illegible] commencement of this suit $100.00 for this week he was not paid in July, and damages at $100.00 per week from October [illegible] let, less $50.00, which would have accrued to some [illegible]. Therefore such evidence justified the judgment in question.

The judgment of the trial court is affirmed.

Affirmed.

Abstract

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

FEBRUARY TERM, A.D.1951

General No. 9730 Agenda No. 11

342 I.A. 215

Bernice I. Van Praag, Plaintiff-Appellee, vs. The National Cash Register Company, a Corporation, Defendant-Appellant.	Appeal from Circuit Court of Macon County

Wheat, J.

Plaintiff-Appellee Bernice I. Van Praag, brought her action in forcible entry and detainer in the Circuit Court of Macon County to recover possession of premises in Decatur, Illinois, occupied by defendant-appellant National Cash Register Company.

Counts I and II of defendant's Amended Answer, alleging alternative equitable defenses, were stricken on plaintiff's motion. Defendant elected to stand on its Answer, and judgment for possession and for double the amount of rent accruing during the period possession was found to have been wrongfully withheld was entered in plaintiff's favor, from which judgment order defendant appeals.

Plaintiff's ownership, defendant's possession under a lease with plaintiff's immediate predecessor in title which lease by its terms expired March 31, 1949, service of notice to vacate, and defendant's refusal are admitted, so that the only question before this Court is whether either count of the Amended Answer

states a defense to plaintiff's action.

The following letter written to defendant by plaintiff's immediate predecessor in title is attached to the Amended Answer as Exhibit 1 and relied upon in connection with both Counts:

7 Feb. 46

The National Cash Register Co.,
Mr. A. G. Counsell,
257 S. Park St.,
Decatur, Illinois

Dear Mr. Counsell:

In reference to our discussion of a renewal of your lease for five years at the time it runs out approximately three years hence, there are several things I wish to emphasize. In the first place the present rental has been too low for more than ten years and we only renewed it two years at the same level for the reason that you had been a tenant since our building was built and also to avoid getting into a prolonged controversy with OPA. However to extend it another five years is impossible. On the other hand I wish to be reasonable, so due to your long tenancy and that (sic) fact that you are going to do some remodelling, I am willing to extend the lease another five years at the rate of Eighty five Dollars ($85.00) per month. This figure puts it more nearly in line with the two stores on either side, all of which are of the same rental value. Trusting this will be satisfactory to you and your company, I am,

Very truly yours,
(s) Lauren L. Shaw
Lauren L. Shaw

Count I of the Amended Answer alleges that in January, 1946, defendant informed the then owners of the premises that it desired to remodel the interior thereof, and therefore desired an option to extend the lease then existing between the parties, that in response and in consideration of the remodeling by defendant, the then owners notified defendant, by means of Exhibit 1, that they would extend the lease for five years at a rental of $85.00 per month, that thereafter, in reliance upon Exhibit 1, and with the full knowledge and consent of the then owners, defendants made

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extensive improvements on the interior of the premises at a cost of $4242.00.

Count I further alleges that thereafter plaintiff entered into negotiations for purchase of the premises and that at her request for a photostatic copy of the then existing lease, defendant furnished same, together with a photostatic copy of Exhibit 1, that plaintiff was thereby put on notice of defendant's claim, but made no inquiry of defendant to determine by what right it held possession, and that on January 26, 1949, defendant informed plaintiff by letter that it exercised the right given by the previous owners to extend the term of the lease, a copy of which letter is attached to the Answer as Exhibit 2, and is as follows:

January 26, 1949

Mrs. Bernice I. Van Praag,
Decatur,
Illinois

Dear Mrs. Van Praag:

It is our understanding that you are the new owner of the premises known as 257 South Park Street, Linxweiler Building, your City, which we have been renting under the lease dated March 2, 1944, with Lauren L. Shaw and Charles E. Lee.

We are pleased to state that we hereby exercise the right given to us by the previous owners to extend our term for a further period of five years beginning April 1, 1949, and ending March 31, 1954, at the monthly rent of $85.00, in accordance with the letter of February 7, 1946, a photogtat of which is attached.

In the event you wish us to prepare a new lease, please let us know. If you wish to prepare the lease, please do so and we shall promptly execute and return the same.

Yours very truly,

The National Cash Register Company
By

K. DILL, Assistant Treasurer.

Count II alleges, in the alternative, that in January, 1946, defendant requested the then owners to make certain improvements on the premises and to increase the rent in such sum as would fairly compensate them therefor, that the then owners orally stated that they were willing instead to extend the lease for a period of five years at a monthly rental of $85.00 if defendant would make the improvements at its own cost and that in response to defendant's request that such offer be put in writing for submission to its officers having authority to accept same, the then owners submitted Exhibit 1 evidencing said offer. Count II further alleges that immediately thereafter, with the knowledge and consent of the then owners, and in reliance upon the extension offered in consideration of making improvements, defendant unequivocally accepted the offer by making numerous permanent improvements at a total cost of $4,242.00.

As to Count I, defendant contends that Exhibit 1, interpreted in the light of the circumstances alleged, constitutes "an absolute agreement" by plaintiff's predecessor to extend defendant's lease at an increased rental in consideration of defendant's remodeling, and urges that no acceptance was called for other than performing the remodeling, because the phrase, "trusting this will be satisfactory", is in effect a statement that if the proposition contained in the letter was not satisfactory the writer expected to hear from defendant.

Although Count I positively alleges that defendant informed plaintiff's predecessor that "it desired an option to extend" the lease and thereafter, as a result, received Exhibit 1, defendant now asserts that it "has at no time contended that the letter in controversy is an option" and appears to suggest, on the contrary,

that Exhibit 1 constitutes an offer which was accepted when defendant made improvements with the knowledge of plaintiff's predecessor. Consequently, it is not clear whether defendant's position is that the offer to extend the lease expressed in Exhibit 1 is an irrevocable offer or option sought by defendant and given by plaintiff's predecessor in consideration for defendant's remodeling or promise to remodel, or whether the remodeling, or promise of it, is a part of the consideration requested for the extended lease term itself. In either event it is manifest that payment of, or a promise to pay rent, at the rate and for the term stated in Exhibit 1 is a condition upon which the offer to extend the lease rests.

It is well settled that the power to create a contract by acceptance of an offer terminates at the time specified in the offer, or if no time is specified, at the end of a reasonable time. (Restatement of Contracts, Sec. 40; 17 C.J.S., 399; Miller v. Illinois Life Ins. Co., 255 Ill.App., 586; McGivern v. Parkhill, 195 Ill.App., 343; Estate Stove Co. v. Kenney, 234 Ill.App., 366). As there is no time limit specified in Exhibit 1, the offer therein contained must have been accepted within a reasonable time in order to bind the parties. While Exhibit 2 is made a part of Count I, defendant has placed little or no reliance upon it as an acceptance of the offer contained in Exhibit 1, and it is clearly insufficient to constitute a valid acceptance, no authority having been cited suggesting that a reasonable time might, in these circumstances, extend over the period of nearly three years which elapsed between the writing of Exhibit 1 and Exhibit 2.

Even if it is assumed that the remodeling, or promise of it, is a part of the consideration requested for the extended lease term, there is no reasonable basis for assuming, in the

circumstances alleged, that defendant's performance of the remodeling can in any way constitute an implied acceptance of the rental rate or term offered, and defendant itself has not so contended, unless by indirection. If an acceptance of the lease extension offer could be so implied, not only the lessor but the lessee would, of course, become bound. It does not appear that even in the particular circumstances alleged, the making of improvements could render defendant liable for failure to pay rent during the extended term had action been brought by plaintiff.

Furthermore, any possibility that the parties regarded the making of the improvements in question as an implied acceptance of the whole offer seems clearly negatived by the construction which defendant's own agent put upon Exhibit 1 in addressing Exhibit 2 to plaintiff. In the latter letter there is no indication whatever that defendant regarded the remodeling of any effect whatever upon the rights and obligations of the parties with respect to the lease as the remodeling is not mentioned. On the contrary, the letter purports to "exercise the right" given by the previous owner to extend the lease term, indicating quite clearly that defendant did not regard Exhibit 2 as an offer which had ripened into a binding contract as the result of the completion of the improvements, and further indicating that, in defendant's view, Exhibit 1 was a continuing offer which it might at any time accept or reject as it saw fit.

Moreover, it seems highly questionable whether the remodeling constitutes any part of the consideration requested for the five year term offered. It is to be noted that Exhibit 1 does not describe the improvements to be made in any way whatever, either as to nature or value, a feature to be expected in deal-

ings among businessmen in order to prevent the undertaking from being illusory, and further that the letter does not say "if you will do or promise to do the remodeling which we have discussed, I am willing to extend the lease" but instead says "due . . . to the fact that you are going to do some remodeling, I am willing to extend the lease . . ."

While defendant has contended that plaintiff was bound to inquire by what right defendant was in possession and that she is charged with constructive notice of all facts which she would have ascertained had inquiry been made, this argument begs the question. It appears from Count I that plaintiff did inquire before purchase at least to the extent of requesting a copy of the then existing lease. While defendant was perhaps under no legal obligation to inform plaintiff that it claimed an extended lease, there seems to be considerable significance in the circumstances that except for the fact that plaintiff is alleged to have been furnished a copy of Exhibit 1, there is no direct allegation that defendant in any way indicated to plaintiff that it claimed an extended term at that time.

These factors are suggestive of the conclusion that the promise to remodel, if relevant at all, was given in consideration for the offer to extend the term rather than for the extended term offered. If this is the case, performance of the remodeling cannot constitute either acceptance of or consideration for the extended term because the remodeling was an act which defendant had already bound itself to perform in consideration for the making of the offer.

However, even if it is assumed that plaintiff's predecessor in title gave defendant an irrevocable offer or option in consideration for defendant's promise to remodel, Exhibit 2 does not

constitute a timely exercise of the option. The rule appears to be the same with respect to termination of an irrevocable offer due to lapse of time, as in the case of a revocable offer; that is, such an offer is terminated after the lapse of a reasonable time in the absence of any express provision to the contrary in the offer itself.

It appears furthermore that delay in accepting an option has been viewed more strictly than in the case of a revocable offer because the party seeking to enforce the option is not himself bound. (See C.M., 298; 17 C.J.S.400; Hayes v. O'Brien, 149 Ill., 403).

Accordingly, it is clear that however Exhibit 1 is interpreted, defendant has failed, in Count I, to allege facts to show that there was a timely acceptance of the offer therein contained resulting in a binding lease extension agreement.

Count II proceeds upon the theory that Exhibit 1 is a memorandum of plaintiff's predecessor's verbal offer to extend the lease and that performance of the improvements in question was a part of the consideration and "an unequivocal acceptance of the extended lease term offered." The factual allegations of Count II differ primarily from those of Count I in that Exhibit 1 is alleged to have been tendered in response to a request for a written offer which could be submitted to agents of defendant having authority to accept or reject the same, no mention whatever being made of Exhibit 2.

Defendant's argument in support of Count II is based entirely on cases in which oral contracts for the purphase or leasing of real estate have been enforced, the doctrine of part-performance being invoked to allow proof of these contracts despite the Statute of Frauds. Defendant appears to conclude from these

cases that when acts of part-performance are shown, such that it would be inequitable to deprive a purchaser or lessee of the value thereof, equity will decree performance of some contract to relieve from the hardship. Such is not the law. It is clearly recognized in decisions relied upon by defendant that even though acts of part-performance are shown which are sufficient to avoid the Statute of Frauds, an issue of fact remains as to whether there was an offer and acceptance. (Melburg v. Dakin, 337 Ill.App., 204; Anderson v. Collinson, 300 Ill.App., 22).

It does not appear how these decisions can aid defendant's Count II, because as the pleadings stand before this court no objection whatever has been asserted by plaintiff to any oral statement alleged, in Count II, to have been made either by defendant or plaintiff's predecessor. Consequently, defendant has not been restricted by the Statute of Frauds in alleging facts to show that an agreement was actually consummated, and the basic question is whether it has succeeded in so doing.

Defendant's primary difficulty appears to be not so much a lack of provable evidence as an over-abundance of written evidence which cannot be reconciled with an oral agreement which defendant might otherwise be in a position to prove. As Count II is framed, the making of improvements is the only act relied upon to show that plaintiff's predecessor's offer was accepted. For the reasons heretofore indicated as to Count I, it appears that an acceptance of the whole of the offer contained in Exhibit 1 cannot be implied from such acts, however they are regarded, and that accordingly Count II does not allege an acceptance of the offer contained in Exhibit 1.

The judgment of the Circuit Court of Macon County is affirmed.

Affirmed.